(16)

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Title: Department of Transportation, et al., Petitioners
v.
Public Citizen, et al.
Docketed: September 9, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-70986, 02-71249)
Decision Date: January 16, 2003
Rehearing Denied: April 10, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 27 2003	Application (03A3) to extend the time to file a petition for a writ of certiorari from July 9, 2003 to August 8, 2003, submitted to Justice O'Connor.
Jun 30 2003	Application (03A3) granted by Justice O'Connor extending the time to file until August 8, 2003.
Jul 25 2003	Application (03A3) to extend further the time from August 8, 2003 to September 7, 2003, submitted to Justice O'Connor.
Jul 28 2003	Application (03A3) granted by Justice O'Connor extending the time to file until September 8, 2003.
Sep 8 2003	Petition for writ of certiorari filed. (Response due October 9, 2003)
Sep 8 2003	Appendix of Department of Transportation, et al. filed.
Sep 23 2003	Order extending time to file response to petition to and including November 10, 2003, for all respondents.
Nov 10 2003	Brief of respondents International Brotherhood of Teamsters, California Labor Federation, Environmental Law Federation in opposition filed.
Nov 25 2003	DISTRIBUTED for Conference of December 12, 2003.
Nov 28 2003	Reply of petitioners Department of Transportation, et al. filed. (Distributed)
Dec 15 2003	Petition GRANTED.
Jan 29 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including February 3, 2004.
Jan 29 2004	Extension of time within which to file respondents' brief on the merits to and including March 12, 2004.
Feb 3 2004	Brief of petitioners Department of Transportation, et al. filed.
Feb 3 2004	Joint appendix filed. (Joint appendix in two volumes).
Mar 2 2004	SET FOR ARGUMENT WEDNESDAY, APRIL 21, 2004.
Mar 3 2004	CIRCULATED.
Mar 11 2004	Brief amici curiae of Defenders of Wildlife, Environmental Defense, and Sierra Club filed. (Distributed)
Mar 11 2004	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Mar 12 2004	Brief of respondents Public Citizen, International Brotherhood of Teamsters, AFL-CIO, California Labor Federation, Environmental Law Federation filed. (Distributed)
Mar 12 2004	Brief amici curiae of American Public Health Association, et al. filed. (Distributed)
Mar 12 2004	Brief amici curiae of South Coast Air Quality Management District, et al. filed. (Distributed)

Mar 12 2004	Brief amici curiae of California, et al. filed. (Distributed)
Mar 15 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Apr 14 2004	Reply of petitioners Department of Transportation, et al. filed. (Distributed)
Apr 21 2004	Argued. For petitioners: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Jonathan Weissglass, San Francisco, Cal.

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a presidential foreign-affairs action that is otherwise exempt from environmental-review requirements under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and Clean Air Act, 42 U.S.C. 7506(c)(1), became subject to those requirements because an executive agency promulgated administrative rules concerning implementation of the President's action.

PARTIES TO THE PROCEEDINGS

Petitioners are: United States Department of Transportation; Federal Motor Carrier Safety Administration (FMCSA); Annette M. Sandberg, as Administrator, FMCSA; and Joanne Haller, as Acting Western Field Administrator, FMCSA.

Respondents who were petitioners in the court of appeals below are: Public Citizen; Brotherhood of Teamsters, Auto and Truck Drivers, Local 70; California Labor Federation; California Trucking Association; Environmental Law Foundation; and International Brotherhood of Teamsters.

Respondents who were petitioners-intervenors in the court of appeals below are: Natural Resources Defense Council and Planning and Conservation League.

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In the Supreme Court of the United States

No.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Transportation (DOT), the Federal Motor Carrier Safety Administration (FMCSA), the Administrator of FMCSA, and the Acting Western Field Administrator of FMCSA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 316 F.3d 1002. The interim final rules of FMCSA are published at 67 Fed. Reg. 12,702 (App., *infra*, 53a-124a), 67 Fed. Reg. 12,758 (App., *infra*, 125a-202a), and 67 Fed. Reg. 12,776 (App., *infra*, 203a-220a).

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2003. A petition for rehearing was denied on April 10, 2003 (App., *infra*, 221a-222a). On June 30, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 8, 2003. On July 28, 2003, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including September 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory provisions and regulations are set out in an appendix to this petition. App., *infra*, 223a-231a.

STATEMENT

In this case, the Ninth Circuit has required the federal agency that is responsible for motor-carrier safety to undertake an extensive review of the environmental effects of the President's decision to lift a trade moratorium. The court of appeals misapplied the Nation's environmental laws and constrained the President's discretion to conduct foreign affairs. The court of appeals' decision also prolongs a significant trade dispute between the United States and Mexico, which the President has sought to resolve in accordance with the requirements of the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605 (1993), and the decision of an international arbitration panel finding the United States to be in violation of its obligations under NAFTA.

1. The President exercises foreign-affairs powers as Commander-in-Chief of the armed forces (U.S. Const.

Art. II, § 2, Cl. 1), through his power to "receive Ambassadors and other public Ministers" (*id.* Art. II, § 3), and in the course of "tak[ing] Care that the Laws be faithfully executed" (*ibid.*). He is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948); see *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive") (citation omitted).

The Foreign Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowers Congress to "regulate Commerce with foreign Nations." This Court has recognized that "[t]he Constitution gives Congress broad, comprehensive" and "plenary" powers to regulate foreign commerce. *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125-126 (1973); accord *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over * * * foreign commerce is not open to dispute").

NAFTA and ensuing trade reforms arise from a joint exercise of the President's foreign-affairs power and Congress's foreign-commerce power. In 1990, the United States, Mexico, and Canada initiated negotiations with the goal of eliminating or reducing trade barriers and creating a free-trade zone that encompasses the three countries. In December 1992, the leaders of the three nations signed NAFTA. Congress implemented NAFTA through, inter alia, the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (19 U.S.C. 3301 *et seq.*). See generally App., *infra*, 7a-8a. NAFTA took effect on January 1, 1994. See *Memorandum on Imple-*

mentation of NAFTA, 29 Weekly Comp. Pres. Docs. 2641 (Dec. 27, 1993); 19 U.S.C. 3311(b).

2. a. This case involves a trade-liberalization policy that the President has determined to implement in accordance with NAFTA and pursuant to express congressional authorization. Since 1982, the President has been empowered to determine whether certain Mexican and Canadian motor carriers may operate in the United States. See 49 U.S.C. 10922(*l*) (1982); 49 U.S.C. 13902(c). Congress has specifically authorized the President to lift or modify an existing trade moratorium adopted in 1982 that has prohibited grants of new operating authority to Mexican motor carriers. The moratorium arose from concerns that Mexico was not permitting United States motor carriers the same access to its markets as Mexican motor carriers have had to United States markets. It prevents Mexican carriers—other than carriers that already have authority to operate in the United States or are not required to obtain operating authority (such as carriers that operate solely in commercial zones along the United States-Mexico border)—from providing cross-border trucking services and scheduled bus service in the United States. See 49 U.S.C. 13902(c); see also App., *infra*, 9a-10a, 56a-57a (discussing history of moratorium).[1]

In NAFTA, the United States agreed to partially phase out the moratorium by, among other things, permitting Mexican carriers to obtain operating authority

[1] The moratorium originally applied to Canadian as well as Mexican motor carriers. In 1982, after the United States entered into a bilateral understanding with Canada, the President lifted the moratorium on new authorizations of Canadian carriers. See *Determination Under the Bus Regulatory Reform Act of 1982*, 47 Fed. Reg. 54,053 (1982); see also App., *infra*, 56a.

for cross-border truck services to or from border States starting in December 1995, and to or from any point in the United States starting in January 2000. Due to concerns about the adequacy of Mexico's regulation of motor-carrier safety, however, President Clinton did not lift the moratorium on cross-border truck services as scheduled. See C.A. Supp. E.R. 16, 19.

In February 2001, an international arbitration panel convened pursuant to NAFTA's dispute-resolution provisions upheld a trade complaint that Mexico had filed against the United States, determining that the moratorium on granting new cross-border operating authority violates NAFTA. App., *infra*, 10a, 59a. The panel recommended that the United States "take appropriate steps to bring its practices with respect to cross-border trucking services * * * into compliance with its obligations under the applicable provisions of NAFTA." C.A. Supp. E.R. 23. Almost immediately after the arbitrators' decision, the President made clear his intention to lift the moratorium on cross-border operations in order to comply with NAFTA and promote trade between the United States and Mexico.[2]

[2] See App., *infra*, 10a; see also, *e.g.*, *Remarks to the Hispano Chamber of Commerce in Albuquerque*, 37 Weekly Comp. Pres. Docs. 1174, 1176 (Aug. 15, 2001) ("[W]e ought to enforce all of NAFTA. I believe strongly we can have safety on our highways without discriminating against our neighbors to the south. * * * [I]f United States trucks and Canadian trucks are allowed to move freely on our highways, we can not only enforce the laws; it will help prosperity spread its roots throughout our neighborhood."); *Remarks Prior to a Meeting with Virginia Gubernatorial Candidate Mark Earley and an Exchange with Reporters*, 37 Weekly Comp. Pres. Docs. 1103, 1104 (July 26, 2001) ("[Mexican truckers] need to be treated just like the Canadians are treated. We ought to accept the spirit of NAFTA."); Steven Greenhouse, *Bush to*

b. The Federal Motor Carrier Safety Administration (FMCSA) is the agency within the Department of Transportation that is responsible for motor-carrier safety and registration. See 49 U.S.C. 113(f). FMCSA operates under a general statutory mandate to grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" applicable safety and financial-responsibility requirements for receiving operating authority. 49 U.S.C. 13902(a)(1). FMCSA has no authority to base those registration decisions on environmental considerations or to promulgate or enforce environmental requirements for motor carriers.

In May 2001, following the decision of the NAFTA arbitration panel and the President's announcement of his intention to lift the moratorium, FMCSA published for comment proposed rules addressing the regulation of Mexican motor carriers seeking authority to conduct cross-border operations. One of the proposed rules (the Application Rule) involved the establishment of a new application form specifically for Mexican carriers that might seek cross-border operating authority, in order to require those carriers to submit more detailed safety-related information than was required on the form that the carriers previously would have used to apply for such authority. See *Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. 22,371, 22,372 (2001). Another (the Safety Monitoring Rule) proposed a safety-inspection regime for most Mexican motor carriers, including (but not limited to) carriers that

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Open Country to Mexican Truckers, N.Y. Times, Feb. 7, 2001, at A12.

would receive operating authority under the Application Rule. See *Safety Monitoring System and Compliance Initiative for Mexican Motor Carriers Operating in the United States*, 66 Fed. Reg. 22,415 (2001).[3]

c. In December 2001, Congress enacted Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864, which addressed cross-border operations by Mexican trucks. Section 350 provided that no funds appropriated under the 2002 Appropriations Act could be "obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border" until, among other things, FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers. Pub. L. No. 107-87, § 350(a), 115 Stat. 864. In February 2003, Congress extended the conditions of Section 350 to appropriations for Fiscal Year 2003. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419.

d. Meanwhile, in January 2002, as part of its consideration of the Application and Safety Monitoring Rules (and related proposed rules that are not at issue in this case), FMCSA released an Environmental Assessment. C.A. E.R. 26-164. FMCSA assumed in its environmental analysis that the President would lift the moratorium on cross-border operations. See *id.* at 40-51. FMCSA explained (*id.* at 40-41) that the President had announced his intention to comply with the

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[3] A third rule proposed on the same day, which concerns application rules for Mexican motor carriers operating solely in border commercial zones, is not at issue in this case.

arbitration panel's decision by lifting the moratorium, and that FMCSA's proposed rules concerning cross-border operations would have no practical impact until the President lifted the moratorium. FMCSA concluded that changes in Mexican truck and bus traffic that are the result of lifting the moratorium, rather than FMCSA's safety program, should be attributed to the President's trade action rather than the safety rulemaking. *Id.* at 42.

Against that background, FMCSA compared the environmental impacts of its "Proposed Action" alternative, under which FMCSA would adopt the new rules and the President would lift the moratorium, with the "Baseline Scenario," under which FMCSA would not promulgate new safety rules and the moratorium would remain in place, and the "No Action" alternative, under which FMCSA would not promulgate the proposed new rules but the moratorium nevertheless would end (a scenario that, FMCSA recognized, would not occur as a practical matter in light of the spending restrictions of Section 350, see C.A. E.R. 40-41). See *id.* at 43-46. FMCSA assessed the potential effects of the alternatives on traffic and congestion (*id.* at 76-83), public safety and health (*id.* at 83-89), air quality (*id.* at 89-99), noise (*id.* at 99-106), and socioeconomic factors (*id.* at 106-113). Based on its review, FMCSA concluded that "because the Proposed Action by FMCSA is mostly administrative"—involving procedures for obtaining operating authority—"impacts associated with this Action are expected to be minor." *Id.* at 114. In particular, FMCSA determined that the foreseeable environmental impacts associated with inspectors' conduct of roadside safety inspections of Mexican trucks and buses were not significant, and that if those impacts became significant in the future, they could be

mitigated without modifying the proposed safety rules. *Id.* at 114-115. Accordingly, FMCSA determined that the Application Rule and the Safety Monitoring Rule would have no significant impact on the human environment and that a full environmental impact statement (EIS) therefore was not required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* C.A. E.R. 25.

e. On March 19, 2002, FMCSA issued its Application Rule (App., *infra*, 53a-124a) and Safety Monitoring Rule (*id.* at 125a- 202a). In preambles to the new rules, FMCSA explained that its Environmental Assessment satisfied concerns, which had been expressed by some members of the public in their comments on the proposed rules, that FMCSA was required to review the rules under NEPA. See App., *infra*, 64a-65a, 154a-155a.

FMCSA additionally rejected the argument of the Attorney General of California that FMCSA was required to perform a so-called "conformity review" of the proposed rules under the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1). The CAA provides that a federal agency shall not "engage in, support in any way or provide financial assistance for, license or permit, or approve" any activity that does not "conform" to the requirements of a state air-quality implementation plan that has been established under the CAA. 42 U.S.C. 7506(c)(1). FMCSA stated that its rules did not have to be assessed in greater detail for compliance with the conformity requirement because they (1) involve only "improv[ing] FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border" (App., *infra*, 66a), and (2) are exempt from the conformity-review requirement under an Environmental Protection Agency

(EPA) regulation that establishes threshold emission amounts for various pollutants, below which no conformity review is required. *Id.* at 65a-66a, 155a; see 40 C.F.R. 93.153(b).[4]

Specifically addressing the relationship between its rules and the moratorium on granting operating authority for cross-border operations by Mexican carriers, FMCSA explained that its rules would not "'open the border' or lift the current moratorium." App., *infra*, at 79a. The agency noted that "[t]he President, not the FMCSA, has that authority." *Ibid.* FMCSA further observed that "[t]he President has announced that the United States will comply with its NAFTA obligations regarding Mexico-domiciled motor carrier access in a manner that will not weaken motor carrier safety. The regulations help ensure motor carrier safety in anticipation of presidential action lifting the moratorium." *Ibid.*

On the same day that FMCSA published the Application Rule and Safety Monitoring Rule, it also promulgated a rule that was required by the Motor Carrier Safety Improvement Act of 1999, 49 U.S.C. 31148, to establish training and certification requirements for all persons who conduct federal motor-vehicle safety inspections and safety audits of domestic and foreign motor carriers. See App. *infra*, 203a-220a (Auditor Certification Rule); see also *id.* at 205a-206a (discussing statutory background). Although that rule was not limited to Mexican carriers, Congress in the 2002

[4] FMCSA also relied on EPA's de minimis exemption for rulemakings, 40 C.F.R. 93.153(c)(2)(iii). See App., *infra*, 65a-66a. The court of appeals found that provision of EPA's regulations inapplicable to FMCSA's Application and Safety Monitoring Rules, see *id.* at 48a-51a, and this petition does not seek review of the court of appeals' determination on that point.

appropriations rider had made promulgation of that industry-wide rule a prerequisite to expending funds on processing Mexican carriers' applications for cross-border operating authority. See Pub. L. No. 107-87, § 350(a)(10)(B), 115 Stat. 866.

f. In November 2002, the President modified the trade moratorium to allow FMCSA to register Mexican carriers for cross-border operations. App., *infra*, 232a-234a. The President determined that permitting cross-border operations is "consistent with obligations of the United States under NAFTA and with our national transportation policy," and that "expeditious action is required to implement th[e] modification to the moratorium." *Id.* at 233a.

3. Respondents filed petitions for review of the Application, Safety Monitoring, and Auditor Certification Rules, asserting that the rules were promulgated in violation of NEPA, the conformity requirement of the CAA, and the Administrative Procedure Act, 5 U.S.C. 701-706. See App., *infra*, 13a. The Ninth Circuit granted the petitions for review.

a. The court of appeals first determined (App., *infra*, 14a-26a) that respondent Public Citizen—which alleges that some of its members who live near the Mexican border would suffer adverse health consequences from increased emissions attributable to cross-border operations by Mexican commercial vehicles, see *id.* at 16a-17a—has standing to challenge FMCSA's safety rules.

The court did not suggest that FMCSA's rulemakings themselves determined whether the border would be opened to Mexican carriers. To the contrary, the court recognized that, by the time FMCSA issued its safety rules, "the President * * * had already indicated his intention to comply with NAFTA by lifting the trucking moratorium" (App., *infra*, 19a) and "com-

mitted himself to a course of action to which the United States was obligated under an important international treaty * * * as to which it was then in default" (*id.* at 21a-22a). Nevertheless, the court concluded that respondents sufficiently alleged both causation and redressability. The court reasoned that Mexican trucks would be able to conduct cross-border operations if FMCSA's safety regulations were upheld, but, if the petition for review were granted, then Mexican trucks would be temporarily excluded by virtue of Section 350, pending FMCSA's completion of a new environmental analysis. See *id.* at 22a-23a.

b. Turning to the merits, the court of appeals concluded that FMCSA's Environmental Assessment was deficient under NEPA because the agency failed to consider the overall environmental impact of lifting the moratorium on Mexican trucks and buses, and instead confined its analysis to the narrower effects of FMCSA's safety regulations themselves. App., *infra*, 28a-43a. Quoting regulations promulgated by the Council on Environmental Quality (CEQ) to guide federal agencies' implementation of NEPA, the court determined that FMCSA was required to consider the effects of lifting the trade moratorium because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the [Environmental Assessment] was prepared." *Id.* at 31a (quoting 40 C.F.R. 1508.7 and 1508.8(b)). The court further concluded that, in studying the effects of the border opening, FMCSA should assess those effects on a long-term basis by determining the most likely routes of Mexican traffic, and then conducting localized environmental analysis for particular geographic areas. See *id.* at 33a-39a. The court also faulted FMCSA for failing to consider additional alternatives to its proposed safety rules,

"such as, for example, proposing more stringent controls on incoming Mexican trucks." *Id.* at 42a. Finally, the court disagreed (*id.* at 43a-45a) with FMCSA's view that the Auditor Certification Rule comes within a categorical exclusion from any requirement of further NEPA analysis.[5]

c. The court of appeals further determined that DOT erred in failing to undertake a region-by-region conformity review of the border opening under the Clean Air Act. App., *infra*, 46a-51a. The court reasoned that although FMCSA had determined that its regulations would not lead to any significant increase in motor-vehicle emissions, that determination was based on what the court regarded as an "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." *Id.* at 47a.

The court remanded the case to DOT for the preparation of "a full Environmental Impact Statement" under NEPA and a conformity determination under the CAA, with respect to all three regulations. App., *infra*, 52a.

REASONS FOR GRANTING THE PETITION

The President of the United States must be able to act quickly and with assurance to implement the decisions that are entrusted personally to him. That is particularly true when, as here, the President's responsibilities involve relations with other nations. In

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[5] The court of appeals determined (Pet. App. 43a-45a) that the Auditor Certification Rule is not categorically excluded from NEPA review under implementing regulations of the CEQ and DOT. This petition does not seek review of that holding. DOT is preparing an environmental assessment to address the environmental consequences of the Auditor Certification Rule and to determine whether a full EIS should be prepared.

this case, the Ninth Circuit has construed the environmental laws as contravening that constitutionally grounded necessity. The Ninth Circuit's approach is unsupported by the relevant statutes and inconsistent with agency regulations. If not overturned, the court of appeals' decision will delay substantially the United States' compliance with the North American Free Trade Agreement and the arbitration panel's decision of February 2001. That delay is causing the Government of Mexico to continue its parallel restrictions on operations by United States motor carriers and to threaten new trade sanctions. For all of those reasons, this Court's review is warranted.[6]

1. The court of appeals erred fundamentally in concluding that the National Environmental Policy Act and the Clean Air Act render "illusory" (App., *infra*, 47a) the critical distinction, under our Constitution and laws, between an action the President takes pursuant to his foreign-affairs powers and statutory authority vested in him, and a subordinate federal agency's domestic regulatory action. The court of appeals' decision takes away presidential discretion that NEPA and the CAA preserve.

a. Under NEPA, federal agencies must complete a detailed environmental impact statement before taking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Regulations of the Council of Environmental Quality—which implement the statutory requirement and "are

[6] Although the government argued in the court of appeals that respondents lack standing to challenge the FMCSA's safety rules under the environmental laws, the court of appeals determined that one respondent (Public Citizen) has standing. See pp. 11-12, *supra*. We do not contest the court of appeals' standing determination in this petition.

entitled to substantial deference," *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989)—provide that the "federal agencies" subject to NEPA do not include "the Congress, the Judiciary, or the President." 40 C.F.R. 1508.12. Therefore, the President's determination to implement NAFTA by lifting the moratorium on cross-border operations by Mexican motor carriers is not subject to NEPA's EIS requirement.

The court of appeals did not dispute that. See App., *infra*, 51a ("[W]e draw no conclusions about the actions of the President of the United States."). Instead, the court reasoned that CEQ regulations required FMCSA to prepare an EIS to study the environmental consequences of opening the border, because the President's lifting of the moratorium was a "reasonably foreseeable" consequence of FMCSA's rulemakings. *Id.* at 31a. Thus, in the court's view, an agency having relevant responsibility only for truck and bus safety—and lacking any regulatory responsibility for either international trade or motor vehicle emissions—had to conduct a full NEPA review of the President's foreign-policy decision to open the border, even though the President did not have to undertake such a study of his own action.[7]

In reaching that incongruous and incorrect conclusion, the Ninth Circuit relied particularly on two provisions of the CEQ regulations. The first states that the environmental "effects" that must be studied by federal agencies, see 42 U.S.C. 4332(2)(C)(ii), include

[7] To comply with the court of appeals' decision if it is upheld, FMCSA has entered into a $1.8 million contract with a vendor for the preparation of the EIS and CAA analysis mandated by the court of appeals' decision.

not only direct effects, but also "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8(b); see 40 C.F.R. 1502.16(b). Under that regulation, indirect effects that trigger the EIS requirement must be "caused by the [agency] action." In this case, the effects of the President's opening of the border were not "caused by" FMCSA under the CEQ regulations. As the court of appeals explained, the President already had determined to open the border, see App., *infra*, 20a, and his determination that doing so would be in the best interests of the United States is what "prompted" FMCSA to issue its safety regulations, *id.* at 34a.

The court of appeals' application of CEQ's "indirect effects" rule therefore is flawed in two respects. First, it illogically requires an agency that participates in implementing a policy of the President to treat its own subordinate action as the "cause" of the action that the President earlier had determined to take, and over which the agency had no authority. Second, it subjects to full NEPA review a decision of the President that is not subject to NEPA. NEPA's purpose is "help[ing] public officials make decisions." 40 C.F.R. 1500.1(c); accord *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (discussing EIS requirement). That purpose is not served when a federal agency is required to prepare an EIS concerning a foreign-affairs decision that is exempt from NEPA and outside the agency's control, and, in addition, already has been made.

The courts of appeals have held that agencies are not required to conduct NEPA reviews of "ministerial" decisions over which they have no control. See *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267

F.3d 1144, 1151 (D.C. Cir. 2001) ("If * * * the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore NEPA is inapplicable."); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (collecting cases). Analogously here, when FMCSA conducted an environmental evaluation of its own safety rules it was not required to prepare a full-blown EIS to address the effects of the President's action, over which it had no control.

The court of appeals also relied on a CEQ regulation that provides that agency EISs should address "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. 1508.25(a)(2). A "cumulative impact" is an impact that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" of any person. 40 C.F.R. 1508.7. FMCSA determined that the requirement of considering cumulative effects would be satisfied by comparing the Baseline Scenario (under which the moratorium would remain in place) to both the No Action alternative (opening the border without new FMCSA rules—which the appropriations riders forbade as a practical matter) and the Proposed Action alternative (opening the border with the proposed rules). See pp. 8-9, *supra*. The flaw that respondents asserted and the court of appeals found in FMCSA's analysis is that the agency did not adequately investigate the environmental effects of the President's border-opening decision itself. That is not an issue of the cumulative effects of *FMCSA's* actions. As explained, moreover, the border opening is a presidential action exempt from EIS requirements.

FMCSA's

~~That~~ conclusion is supported by the rule of reason that is inherent in NEPA and CEQ's implementing regulations. The CEQ regulations that apply when an EIS *is* required, for example, require only a "brief discussion" of issues that are not significant (to show why more study is not needed), see 40 C.F.R. 1502.2(b), and make clear that the agency is not required to obtain new information bearing on significant environmental impacts if the cost of doing so would be "exorbitant," 40 C.F.R. 1502.22. Similar principles apply in this case. FMCSA estimates that preparing an EIS addressing the President's decision to lift the trade moratorium would have cost well over one million dollars. FMCSA, however, has no responsibility for the foreign-affairs decision to which that costly effort would have related. Those facts confirm as a commonsense matter that it was not arbitrary and capricious for FMCSA to decline to undertake the massive environmental review contemplated by the court of appeals. See generally *Anderson* v. *Evans*, 314 F.3d 1006, 1015 (9th Cir. 2002) (noting that "arbitrary and capricious" standard applies to agency decision against preparing EIS); *Sierra Club* v. *DOT*, 753 F.2d 120, 126-127 (D.C. Cir. 1985) (same); cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 772, 776 (1983) ("The scope of the agency's inquiries must remain manageable if NEPA's goal of insuring a fully informed and well-considered decision is to be accomplished.") (internal quotations marks, brackets, and citations omitted).[8]

[8] Relatedly, and given the serious foreign-relations concerns presented in this case, see pp. 25-26, *infra*, the court of appeals erred in overturning FMCSA's safety rules and postponing implementation of the President's decision to open the border pending the agency's completion of a full-blown EIS. Even if the court of appeals' faulty NEPA analysis were accepted, the agency still should have been allowed to determine on remand whether the preparation of a full EIS—with the consequent delay—is required. See, *e.g.*, *Wisconsin* v. *Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) (court that finds NEPA violation "should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction.") (quoting *Environmental Def. Fund* v. *Marsh*, 651 F.2d 983, 1006 (5th Cir. 1981)).

b. The above analysis is not changed by the fact that Section 350 required—as a condition precedent to the border opening—promulgation of special FMCSA rules to ensure the safety of those Mexican trucks that would enter the United States following the President's lifting of the moratorium. As the court of appeals itself recognized, the linkage of FMCSA's rules to the President's trade action existed before Congress enacted Section 350. See App., *infra*, 21a-22a, 34a. Furthermore, although Section 350 involved Congress in the border-opening decision, action of Congress is exempt from NEPA under the same provision that exempts unilateral action of the President. See 40 C.F.R. 1508.12. It makes no difference under CEQ's regulations whether the President alone is responsible for lifting the moratorium, or the President and Congress jointly made that decision and specified the conditions under which it would occur. In either event, the decision concerning the Nation's foreign policy and foreign commerce was not made by FMCSA and the lifting of the moratorium is not attributable to FMCSA's safety rules.

The spending restrictions of Section 350 did establish the promulgation of FMCSA's safety rules as a condition precedent to processing Mexican carriers' applications for operating authority under the regulatory statutes administered by FMCSA. That function of processing applications is separate from the President's

decision to lift the moratorium and open the border to Mexican trucks. It therefore is inaccurate to portray FMCSA's actions as the cause of the entry of additional Mexican trucks and any consequent environmental effects. In any event, a mere "but for" relationship is not sufficient to establish the requisite causal link between a proposed agency action and possible environmental effects under NEPA, when there is a supervening action such as the President's foreign- affairs action in this case. See *Metropolitan Edison*, 460 U.S. at 773-774 (stating that NEPA's "effects" standard is not necessarily satisfied by "but for" causation, and drawing analogy to tort liability); cf. 2 *Restatement (Second) of Torts* §§ 440, 442 (1965) (discussing "superseding causes" of tortious injury).[9]

c. The court of appeals stated that FMCSA's Environmental Assessment was deficient not only for failing to consider "the effects of the presidential rescission of the moratorium on Mexican truck entry," but also because of other "methodological flaws." App., *infra*, 47a. It is not clear that the court believed that those "methodological flaws" have significance apart from FMCSA's determination not to conduct a full study of

[9] Likewise, the court of appeals' decision is not bolstered by Congress's statutory clarification that NAFTA implementation is subject to the Nation's environmental laws. 19 U.S.C. 3312(a); see App., *infra*, 7a-8a. The issue in this case is whether the environmental laws require the preparation of an EIS concerning the President's foreign-affairs action, not whether those laws apply to NAFTA implementation. Furthermore, Mexican motor carriers that obtain authorization to operate in this country are "subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the United States" when they provide cross-border service, "including those administered by * * * Federal and State environmental agencies." App., *infra*, 233a-234a.

the environmental effects of the President's decision. See *id.* at 33a-43a. The court's conclusions concerning FMCSA's methodology all seem to flow from its erroneous determination about the necessity of preparing an EIS that addresses the President's actions. Furthermore, every argument that respondents presented to the court of appeals concerning supposed defects in FMCSA's Environmental Assessment depended on their theory that "[t]he challenged rules will have the practical effect—that is, the trucks crossing the border —that will create adverse environmental effects." C.A. Br. of Public Citizen, et al. 32; see *id.* at 27-44; see also C.A. Br. of Natural Resources Defense Council, et al. 17 ("The [Environmental Assessment] fails to take into account the public health effects that will result from an increase in the number of more polluting Mexican-domiciled trucks traveling in the U.S. once the Final Rules are implemented."). Because respondents raised only the border-opening issue in the court of appeals, the petition for review must be denied, and FMCSA's rules sustained, if this Court grants the instant petition for a writ of certiorari and determines that FMCSA was not required to prepare an EIS addressing the environmental effects of the President's decision to lift the moratorium.[10]

[10] The respondents who were petitioners below added a new argument in their Ninth Circuit reply brief. See C.A. Reply Br. of Public Citizen, et al. 21 ("FMCSA has the power to influence the number and type of Mexico-domiciled trucks that travel beyond the border zones by determining which trucks are certified."). But only the arguments made in their opening brief were possible grounds for granting relief. See *Eberle* v. *City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). Moreover, none of the respondents argued in FMCSA's rulemaking proceedings that the agency should adopt particular safety rules because of their environmental

Even if respondents had preserved the argument that FMCSA failed to study adequately the environmental effects of the proposed safety rules *themselves* —and even if that argument had merit—this Court's review of the question presented in the instant petition would be warranted. As explained below, that question has general importance beyond this case. See pp. 24-25, *infra*. Furthermore, the scope of an ensuing agency remand proceeding in this case, and the consequential delay in opening the border to Mexican motor carriers, would be far less if the agency were not required to conduct an entirely new and potentially broad-reaching environmental study of *the President's* decision to open the border to Mexican motor carriers.

2. The court of appeals' application of the CAA is similarly flawed. Under the CAA and implementing regulations promulgated by the Environmental Protection Agency, a federal "department, agency, or instrumentality" generally may not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" that violates an applicable State air-quality implementation plan. 42 U.S.C. 7506(c)(1); 40 C.F.R. 93.150. Presidential actions are not subject to the CAA's conformity requirement because the President is not a federal "department, agency, or instrumentality." See *Franklin* v. *Massachusetts*, 505 U.S. 788, 799-800 (1992); see also 40 C.F.R. 93.152 (using "federal agency" and "Federal department, agency, or instrumentality" interchangeably); *Determining Conformity of General Federal Actions to*

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effects or, more generally, that FMCSA should adopt more stringent rather than less stringent rules in an effort to benefit the environment by marginally reducing the number of Mexican trucks that might enter the United States.

State or Federal Implementation Plans, 58 Fed. Reg. 13,838 (1993) (defining federal "instrumentality" to mean "those Federal entities which are not specifically linked to a 'department' or 'agency,' including, for example, an independent Federal Commission."). Accordingly, the CAA portion of this case, similarly to the NEPA portion, can be resolved—in harmony with the constitutional separation of powers as well as the canon that specific statutory provisions govern general ones—by giving effect to the exclusion of the President from the coverage of the conformity provision.

The correctness of that result is confirmed by EPA's regulation defining "indirect emissions," which the court of appeals itself quoted. See App., *infra*, 49a (quoting 40 C.F.R. 93.152). As the court suggested (*id.* at 48a-49a), federal agencies must consider both the direct emissions that result from their actions (*i.e.*, emissions "caused or initiated by" the action that "occur at the same time and place as the action," 40 C.F.R. 93.152) and the indirect emissions. See generally 40 C.F.R. 93.153(c). "Indirect emissions" are less-proximate air emissions "that would be brought about by agency action, and that the agency can practicably control, and that are subject to a continuing program responsibility of th[e] agency." *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,221 (1993); see 40 C.F.R. 93.152 (defining "indirect emissions").

EPA's indirect-emissions definition ensures that agencies are not required to conduct conformity reviews of "subsequent activity that," although related to an agency action in some way, "is outside the control or responsibility of the federal agency." See *Environmental Def. Fund, Inc.* v. *EPA*, 82 F.3d 451, 464 (per curiam) (upholding regulation), amended, 92 F.3d 1209

(D.C. Cir. 1996). Here, FMCSA has no responsibility or control over the President's decision to lift the moratorium and open the border to Mexican motor carriers, no ongoing ability to control the emissions of Mexican motor carriers engaged in cross-border operations, and no programmatic responsibility for those emissions. The court of appeals did not find otherwise. Accordingly, the emissions that the court of appeals required FMCSA to study under the CAA are neither "direct" (proximate) emissions nor "indirect" emissions resulting from FMCSA's safety rules, and the conformity requirement does not apply to those emissions.

3. a. The Ninth Circuit's misapplication of NEPA and the CAA endangers the President's ability to act quickly and decisively in areas such as foreign affairs and national defense. This Court has long recognized the necessity of preserving presidential discretion in those matters and the inappropriateness of judicial interference with that discretion. See, *e.g.*, *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948). Particularly in the area of international diplomacy, the President must be able to "speak for the Nation with one voice," and to make commitments on behalf of the Nation in the exercise of his judgment and discretion, without fear that those commitments will be overridden by the courts. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381, 382 (2000); see *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984) ("Great nations, like great men, should keep their word.") (brackets omitted). In particular, the fulfillment of the President's lawful commitments should not be delayed or prevented because subordinate executive officials have not undertaken environmental reviews of the President's action or other matters lying outside their authority, or because a court questions whether the

President's action is consistent with conclusions an agency reached in an EIS. The Ninth Circuit's decision also threatens to interfere with the internal operations of the Executive Branch, inasmuch as the President may be deterred from involving executive agencies in the implementation of his policies if doing so might effectively subject the President's own decisions to environmental-review requirements.

No other court of appeals has similarly applied NEPA or the CAA to actions of the President. The uncertainty created by the instant decision is intolerable, particularly when the opponents of agency action, if they coordinate their judicial attack, often are able to choose the judicial circuit that will hear their claims of agency error. See generally 5 U.S.C. 703; 28 U.S.C. 2343.

b. The circumstances of this case vividly illustrate the flaws and practical consequences of the court of appeals' approach. In February 2001, the President announced his determination to comply with the arbitration panel's interpretation of NAFTA by exercising his statutory authority to lift the moratorium on cross-border operations by Mexican trucks and buses. Congress then imposed preconditions for taking that particular action. In November 2002, the congressional conditions were satisfied and the President—acting with the special force of his own inherent authority *plus* express congressional authorization, see *Crosby*, 530 U.S. at 375—lifted the moratorium.

The Ninth Circuit's decision prevents the President's action from taking effect and thereby hampers commerce. On a border where there are approximately 4.5 million northbound truck crossings each year, see C.A. E.R. 55, cargo from Mexico must be transferred at the border onto U.S. trucks before it can be shipped to

points in the United States beyond the border zone. Passengers using scheduled bus services must follow similarly inefficient procedures.

The court of appeals' decision also prolongs a trade dispute between the United States and Mexico. The Government of Mexico asserts that its country has suffered economic damages in the billions of dollars from the moratorium on cross-border operations. See Ricardo Alonso-Zaldivar, *NAFTA Panel Rejects Constraints on Mexico Trucks*, L.A. Times, Feb. 7, 2001, at A1 (claimed losses of $2 billion as of arbitration decision). Mexico has cited the United States' failure to implement the arbitration decision to justify its own restrictions on the operations of United States motor carriers in Mexico, which deprive those carriers of opportunities in the Mexican market. See Tim Weiner, *Mexico Vows to Retaliate Against U.S. on Trucking*, N.Y. Times, Aug. 3, 2001, at A5. The Mexican Government also has indicated that it may implement retaliatory trade restrictions against the United States in proportion to its claimed losses. See John Nagel, *Transportation: Mexico Seeks Urgent Meeting to Discuss Implementation of Cross-Border Trucking*, 20 Int'l Trade Rep. (BNA) 521 (2003). The Ninth Circuit's decision therefore is causing serious and ongoing harm to United States' businesses and consumers and to international relations with Mexico.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2003

Supreme Court, U.S.
FILED

03 358 SEP 8 2003

No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 02-70986, 02-71249

PUBLIC CITIZEN; BROTHERHOOD OF TEAMSTERS, AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION; CALIFORNIA TRUCKING ASSOCIATION; ENVIRONMENTAL LAW FOUNDATION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL; PLANNING AND CONSERVATION LEAGUE, PETITIONERS-INTERVENORS

v.

DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; NICHOLAS R. WALSH, RESPONDENTS

INTERNATIONAL BROTHERHOOD OF TEAMSTERS; BROTHERHOOD OF TEAMSTERS, AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION; CALIFORNIA TRUCKING ASSOCIATION; ENVIRONMENTAL LAW FOUNDATION; PUBLIC CITIZEN, PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL; PLANNING AND CONSERVATION LEAGUE, PETITIONERS-INTERVENORS

v.

U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; JOSEPH M. CLAPP; NICHOLAS R. WALSH, RESPONDENTS

Argued and submitted: Oct. 8, 2002
[Filed: Jan. 16, 2003]

Before: D.W. NELSON, HAWKINS and WARDLAW, Circuit Judges

OPINION

WARDLAW, Circuit Judge.

Petitioners[1] challenge the Department of Transportation's failure to conduct the requisite environmental analyses prior to promulgating three regulations, the combined effect of which will permit Mexico-domiciled motor carriers to operate within the United States beyond the current limited border zones, thus fulfilling the United States' obligations under the North American Free Trade Agreement. Upon completion of a preliminary Environmental Assessment for two of the three regulations, the Department of Transportation decided that there was no need for further environmental analysis. Petitioners claim that the Department of Transportation's failure to prepare an in-depth Environmental Impact Statement for all three regulations violates the National Environmental Policy Act of 1969, and that its further failure to conduct a "conformity determination" to ensure that the regulations do not disrupt applicable State Implementation Plans violates the Clean Air Act. Although we agree with the importance of the United States' compliance with its treaty obligations with its southern neighbor, Mexico, such compliance cannot come at the cost of violating United States law. Because we conclude that the Department of Transportation acted without regard to well-established United States environmental laws, we grant the petitions.

[1] The petitioners in this case are Public Citizen; the Brotherhood of Teamsters, Auto and Truck Drivers, Local 70; the California Labor Federation; the California Trucking Association; the Environmental Law Foundation; and the International Brotherhood of Teamsters. We will refer to them (as well as the Petitioners Intervenors, discussed below) collectively, as "Petitioners" unless otherwise noted.

I. LEGAL BACKGROUND

Before proceeding to the regulations at issue, it is useful to examine the legal and regulatory context in which they were promulgated. These regulations can only be considered against the historical backdrop of the National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f) ("NEPA"), the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), and the North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1-9), 32 I.L.M. 605 (chs.10-22) (1993) ("NAFTA").

A. National Environmental Policy Act of 1969

On January 1, 1970, President Richard Nixon signed NEPA into law. Although various state and federal environmental measures had been in place for decades, this statute marked the first nationwide comprehensive approach to regulating the interaction between Americans and their environment. Prompted by a series of environmental crises in the late 1960s, NEPA's sweeping reach reflected Congress's conviction that "our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces." S. Rep. No. 91-296, at 4 (1969).

Such broad policy creation was also reflected in the statute's first section, containing the congressional declaration of purpose:

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321. To accomplish these ends, Congress imposed extensive procedural requirements on government action affecting the environment. Paramount among these were the requirements that all federal agencies shall, "to the fullest extent possible":

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality

> of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(2). Congress further directed that, again "to the fullest extent possible," "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter." *Id.* § 4332(1). This unequivocal command has guided the United States' environmental policy for more than thirty years, and pervades every aspect of government decisionmaking.

B. Clean Air Act

Federal air quality legislation dates back to at least the mid-1950s, and the CAA itself to 1963, Pub.L. No. 88-206, 77 Stat. 393, but it was the substantial amendment in 1970, Pub.L. No. 91-604, 84 Stat. 1713, that gave the Act its modern, far-reaching scope. The Act was amended again to further broaden its reach in 1977, Pub.L. No. 95-95, 91 Stat. 749, and in 1990, Pub.L. No.

101-549, 104 Stat. 2399. Before the 1970 Amendments, there existed no federal air pollution standards, nor mandatory enforcement mechanisms; federal officials could only encourage states to develop air-quality enforcement programs. All this was dramatically altered by the 1970 Amendments, which mandated national air quality standards and deadlines for their attainment. Pub.L. No. 91-604, § 4, 84 Stat. at 1678-89. These amendments also created an innovative federal-state partnership structure whereby states were to develop individual "implementation plans" to attain compliance with federal standards, and the newly created Environmental Protection Agency ("EPA") was charged with evaluating, overseeing, and enforcing state compliance with these plans. *Id.* The 1970 Amendments specifically addressed for the first time hazardous pollutants and automobile exhausts, bringing these "mobile sources" within the scope of the EPA's authority. *Id.* §§ 6-9, 84 Stat. at 1690-700.

The 1977 Amendments added an important procedural safeguard: they forbade the federal government and its agencies from "engag[ing] in, support[ing] in any way or provid[ing] financial assistance for, licens[ing] or permit [ting], or approv[ing], any activity which does not conform to [an approved state] implementation plan." 42 U.S.C. § 7506(c)(1). The Act defined "conformity" broadly to include a restriction on such things as "increas[ing] the frequency and severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area." *Id.* § 7506(c)(1)(B). This prevented the federal government from hindering states' abilities to comply with the Act's requirements. Finally, the 1990 Amendments vastly increased the list of regulated

pollutants, as well as the EPA's civil and criminal enforcement capabilities.

C. North American Free Trade Agreement

On December 17, 1992, President William J. Clinton signed NAFTA, establishing a free-trade zone encompassing the United States, Canada, and Mexico. Upon submission to Congress, it was enacted into law as the North American Free Trade Agreement Implementation Act, Pub.L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301-3473) (effective Jan. 1, 1994).

NAFTA aimed to "CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation" while "STRENGTHEN[ING] the development and enforcement of environmental laws and regulations." *Id.* pmbl., 32 I.L.M. at 297. Indeed, environmental concerns dominated the debate over NAFTA in the United States. President Clinton waited for over a year to submit the agreement to Congress while the parties negotiated a side agreement, the North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480. The NAFTA agreement itself explicitly permits member states to adopt or maintain

> standards-related measures, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers . . . includ[ing] those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable

requirements of those measures or to complete the Party's approval procedures.

NAFTA art. 904(1), 32 I.L.M. at 387.

The treaty as enacted into United States law specifically determined that in the case of a conflict between the treaty and federal law, federal law would prevail. 19 U.S.C. § 3312(a)(1) ("No provision of the Agreement . . . which is inconsistent with any law of the United States shall have effect."). Congress also made clear that NAFTA cannot be construed "to amend or modify any law of the United States, including any law regarding . . . the protection of human, animal, or plant life or health [or] the protection of the environment." *Id.* § 3312(a)(2).

II. PROCEDURAL HISTORY

Before us are three regulations, all promulgated on March 19, 2002 by the Federal Motor Carrier Safety Administration ("FMCSA"), an agency within the Department of Transportation (collectively "DOT"). These regulations will permit complying Mexico-domiciled trucks to operate in the United States beyond specified border zones. They are: (1) Application by Certain Mexico Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States Mexico Border, 67 Fed. Reg. 12,702 (Mar. 19, 2002) ("Application Rule"); (2) Safety Monitoring System and Compliance Initiative for Mexico Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12,758 (Mar. 19, 2002) ("Safety Rule"); and (3) Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, 67 Fed. Reg. 12,776 (Mar. 19, 2002) ("Certification Rule"). Under current law, such vehicles are allowed only in so-

called "border zones"—specially designated areas near the United States–Mexico border. Application Rule, 67 Fed. Reg. at 12,702. The regulations were issued in compliance with a rider to the 2002 Appropriations Act for DOT, which conditioned funding for permitting Mexican truck traffic into the United States on DOT's issuance of appropriate safety and inspection rules. *See* Department of Transportation and Related Agencies Appropriations Act, 2002, § 350, Pub.L. No. 107-87, 115 Stat. 833, 864 (2001) ("Appropriations Act"). Petitioners assert that DOT failed to examine adequately the environmental consequences of these regulations, as required by NEPA and CAA.

Foreign trucks are permitted to enter the United States only if they are authorized to do so. *See generally* 49 U.S.C. §§ 13501-13541, 13901-13908; 49 C.F.R. § 365.101-.511. DOT is generally required to grant such permission to any carrier that is "willing and able to comply with" certain statutes and regulations. 49 U.S.C. § 13902(a)(1). In 1982, however, Congress enacted the Bus Regulatory Reform Act of 1982, which imposed a two-year moratorium on the entry of motor carriers domiciled in a "contiguous foreign country," Pub.L. No. 97-261, § 6(g), 96 Stat. 1102, 1107-08, such as Mexico. This moratorium was renewable for subsequent two-year intervals by the President "in the national interest." *Id.*, 96 Stat. at 1108. The moratorium remained in place, through a series of presidential orders, until September 19, 1996.[2]

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[2] *See* 60 Fed. Reg. 12,393 (Mar. 2, 1995); 57 Fed. Reg. 44,647 (Sept. 25, 1992); 55 Fed. Reg. 38,657 (Sept. 17, 1990); 53 Fed. Reg. 36,430 (Sept. 15, 1988); 51 Fed. Reg. 34,079 (Sept. 23, 1986); and 49 Fed. Reg. 35,001 (Aug. 30, 1984).

Before the last two-year extension expired, the ICC Termination Act of 1995 was signed into law, causing all "existing restrictions on operations of motor carriers . . . domiciled in any contiguous foreign country . . . pursuant to section 6 of the Bus Regulatory Reform Act of 1982" to remain in effect unless and until the President expressly rescinded them for a statutorily acceptable reason, including "obligations of the United States under a trade agreement." 49 U.S.C. § 13902(c).

On February 6, 2001, a specially convened treaty arbitral panel determined that the United States' continued refusal to permit the entry of Mexican trucks beyond the restricted border zones violated NAFTA. Thereafter, as recited in the EA prepared by DOT, President George W. Bush "announced his intent to comply [with this ruling] by modifying the moratorium, pursuant to his statutory authority, once FMCSA [was] ready to issue . . . regulations governing Mexico-domiciled [trucks] seeking United States operating authority."

After the NAFTA arbitral panel issued its opinion, DOT published Notices of Rulemaking for the Application and Safety Rules on May 3, 2001. *See* 66 Fed. Reg. 22,371 (May 3, 2001) (Application Rule); 66 Fed. Reg. 22,415 (May 3, 2001) (Safety Rule). Meanwhile, in 1999, Congress had enacted the Motor Carrier Safety Improvement Act, mandating that DOT "complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors . . . to conduct safety inspection audits and reviews." 49 U.S.C. § 31148(a). The FMCSA was in the process of preparing these rules in 2001.

On December 18, 2001, the 2002 DOT Appropriations Act was signed into law. Pub.L. No. 107-87, 115 Stat. at 833. Section 350 of that Act provides:

> (a) No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond [the border zone] until the Federal Motor Carrier Safety Administration [issues safety and auditor-certification regulations, and conducts safety studies that meet certain specified criteria].
>
> . . . .
>
> (c) No vehicles owned or leased by a Mexican motor carrier may be permitted to operate beyond [the border zone] under conditional or permanent operating authority granted by the Federal Motor Carrier Safety Administration until—
>
> (1) the Department of Transportation Inspector General conducts a comprehensive review of border operations . . . . [and]
>
> (2) [t]he Secretary of Transportation certifies in writing in a manner addressing the Inspector General's findings . . . that the opening of the border does not pose an unacceptable safety risk to the American public.

Id. § 350, 115 Stat. at 864-68 (codified at 49 U.S.C. § 13902 note).

DOT subsequently modified the Application, Safety, and Certification Rules to comply with the requirements of the Appropriations Act. Recognizing the need

to comply with the regulations implementing NEPA, DOT prepared a preliminary Environmental Assessment ("EA") for the Application and Safety Rules, evaluating their likely environmental impact. DOT determined that a full Environmental Impact Statement ("EIS") was not required, concluding that the proposed rules did not "significantly affect[ ] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Thus, it issued a Finding of No Significant Impact ("FONSI") along with the EA on January 16, 2002. DOT did not prepare an EA for the Certification Rule, because it determined that this regulation fell into the categorical exclusions from the EA/EIS requirement in the NEPA regulations. As a result, DOT also did not include the Certification Rule in its FONSI. Nor did DOT prepare a CAA conformity determination for any of the regulations because it determined that certain categorical exceptions to the conformity-determination requirement applied to them.

All three regulations were published in the *Federal Register* as "Interim Final Rules" on March 19, 2002. The Application Rule updates the requirements for Mexican carriers applying to use United States roads, including the applicants' ability to comply with certain United States truck safety regulations. *See* Application Rule, 67 Fed. Reg. at 12,735-40. Furthermore, the application form requires the carriers to agree to undergo pre-authorization safety audits, provide proof of insurance, and submit to inspection every three months. *Id.* at 12,715. The Safety Rule extends "provisional" operating authority to Mexican carriers for the first eighteen months they are licensed to enter the United States, subjecting them to intensified inspection during that period. Safety Rule, 67 Fed. Reg. at 12,771-73.

Upon successful completion of this initial period, carriers become eligible to receive "permanent" operating authority, under which they remain subject to less intensive monitoring and inspection. *See id.* The Certification Rule establishes certification procedures for the requisite personnel to conduct safety and compliance inspections. Certification Rule, 67 Fed. Reg. at 12,779.

Petitioners filed a timely petition challenging the validity of the Application and Safety Rules on May 2, 2002 (No. 02-70986), and a timely petition challenging the validity of the Certification Rule on May 14, 2002 (No. 02-71249). Both petitions, alleging violations of the procedural requirements of NEPA and the CAA, were brought pursuant to the judicial review provision of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"). We have jurisdiction to review the petitions under 28 U.S.C. § 2342(3)(A), which provides for direct review in the court of appeals of certain administrative actions. We consolidated the petitions by an order dated May 22, 2002. On June 14, 2002, we permitted the Natural Resources Defense Council and the Planning and Conservation League to intervene on behalf of Petitioners.

The DOT Inspector General filed a report regarding his "comprehensive review of border operations" on June 25, 2002, and the Secretary of Transportation issued his written certification on November 20, 2002. As promised, following DOT's certification of its readiness to issue the regulations, President Bush modified the trucking moratorium (subsequent to oral argument) to permit Mexico-domiciled motor carriers to provide

cross-border services.[3] *See* Memorandum of November 27, 2002, 67 Fed. Reg. 71,795 (2002).[4] The moratorium remains in place now only as to Mexico-domiciled motor carrier services between points in the United States. *Id.*

III. STANDING

We must first address Petitioners' standing to sue. Even though standing was not an issue in the administrative proceedings, "federal courts are under an independent obligation to examine their own jurisdiction, and standing' is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed.2d 603 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed.2d 556 (1984)) (alteration in original). We need only find that one petitioner has standing to allow a case to proceed. *See, e.g., Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1331 (9th Cir. 1997) (White, Justice, by designation) (evaluation of the standing of a second plaintiff is "unnecessary to resolution of the case"); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L.Ed.2d 309 (1981) ("There are three groups of plaintiffs in this litigation. . . . Because we find [that

[3] We ordered the parties to submit supplemental briefing addressing the effect of the President's order modifying the Mexican-domiciled motor carrier moratorium on the issues presented in this case. Simultaneous supplemental briefs were filed on December 13, 2002.

[4] President Bush had previously modified the moratorium, in a manner not affecting this case, by permitting United States-domiciled Mexican-owned or -controlled motor carriers to provide services within the United States. *See* Memorandum, 66 Fed. Reg. 30,799 (2001).

one of the groups] has standing, we do not consider the standing of the other plaintiffs."). Thus, at Petitioners' suggestion, we consider only the standing of Public Citizen.

We look first to Public Citizen's ability to satisfy the constitutional requirements for standing, then turn to the requirements for organizational and statutory standing under the APA.

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992)). We address these constitutional minima in turn.

A. Injury in Fact

"To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (quoting *Defenders of Wildlife*, 504 U.S. at 573 n. 8, 112 S. Ct. 2130). The "procedures in question" here require federal agencies to perform certain types of environmental analysis

before promulgating regulations. Public Citizen has adequately alleged that DOT failed to properly follow these procedures. "In NEPA cases, we have described [the] 'concrete interest' test as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Id.* (quoting *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 n. 5 (9th Cir. 1995)). The same inquiry is appropriate in a CAA case, such as this, where a federal agency has allegedly failed to conduct a conformity determination. That is, environmental petitioners must allege that they will suffer harm by virtue of their geographic proximity to the situs of the claimed pollution.

Public Citizen describes itself as an organization whose "members include residents who reside along the Mexican border area in the United States and will be negatively affected by increases in emissions" from Mexico-domiciled trucks if they are allowed into this country. This includes "2,567 . . . members [who] live in greater Los Angeles, 1,205 [who] live in the San Diego area, . . . [and] 1,094 [who] live in the greater Houston area." These are the geographic areas most likely to be affected by increased truck traffic from Mexico.

Public Citizen further alleges that its "members [who] live and work in [these] areas . . . that will be most affected by increased emissions from Mexico-domiciled trucks . . . will be exposed to such emissions, and as a result may suffer adverse health effects." An individual member of Public Citizen from Houston[5] has submitted a declaration informing us that

[5] We note that, according to the U.S. Geological Survey's National Biological Information Infrastructure, Houston has surpassed Los Angeles as the most air-polluted city in the United States. *See* http://cswgcin.nbii.gov/urban/urban.html.

he monitors smog levels due to diesel truck traffic via e-mail alerts and that he limits his family's outdoor recreational activity when such alerts occur out of concern for their health.

We have held that "evidence of a credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries to cognizable interests that may confer standing." *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001); *cf. Natural Res. Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 994 (9th Cir. 2000) (Plaintiffs alleged sufficient injury in fact when they testified that "they have derived recreational and aesthetic benefit from their use of the [affected area] . . . , but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like."). Cognizable "credible threat[s]" include " 'increased traffic, pollution, and noise,'" *Hall*, 266 F.3d at 976 n. 6 (quoting *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176 (3d Cir. 2000)), and "increased auto emissions," *id.* (citing *Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997)). This jurisprudence is consistent with the Supreme Court's rule that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183, 120 S. Ct. 693 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972)). Accordingly, Public Citizen's allegations and supporting evidence fall squarely within our rule, and satisfy the injury-in-fact requirement.

B. Causation

"Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Cantrell*, 241 F.3d at 682; *accord Hall*, 266 F.3d at 975 (Petitioners "'seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs,' . . . establish standing 'without meeting all the normal standards for redressability and immediacy.'" (quoting *Defenders of Wildlife*, 504 U.S. at 572 & n. 7, 112 S. Ct. 2130)). Unlike in an ordinary causation analysis, a petitioner asserting a procedural injury "need only establish 'the *reasonable probability* of the challenged action's threat to[his] concrete interest.'" *Hall*, 266 F.3d at 977 (quoting *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998)) (emphasis added) (alteration in original).

Both in its briefing and at argument, DOT asserted that Public Citizen had not sufficiently established causation because the challenged regulations would not have permitted cross-border Mexican truck traffic unless the President of the United States lifted the moratorium. The President's November 27, 2002 order modifying the moratorium rendered this assertion moot. Even before the President acted, however, Public Citizen's asserted injury could reasonably be linked to DOT's action. Thus, constitutionally adequate causation existed at the time the petitions were filed. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L.Ed.2d 170 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review . . . .").

DOT's argument hinged on the fact that the President, an independent actor not before this Court, had the ability to stop Mexican trucks at the border even if DOT's regulations were implemented. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir.2000) ("[T]he causal connection put forward for standing purposes cannot be too speculative, or *rely on conjecture about the behavior of other parties* . . . ." (emphasis added)); *cf. Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997) ("[T]he injury must . . . not [be] the result of the independent action of some third party not before the court.").

Thus, two parties had to act before the effect complained of would have come about: the President, who had already indicated his intention to comply with NAFTA by lifting the trucking moratorium, and DOT, which had been obligated by Congress, on penalty of budgetary restrictions, to promulgate safety and inspection regulations governing Mexican trucks. Petitioners and DOT engaged extensively over what would be the appropriate metaphor for such an unusual situation, in which two independent parties had the ability to stop an event from occurring, but both had to take action for the event to occur. Public Citizen suggested that the situation was like a door with two locks, where two independent parties each had to use their keys to open the door, or it would have remained shut. DOT asserted that although it had used its key on one of the locks, the President had the more critical key because its use was entirely within his discretion, and not dependent upon a temporary appropriations rider.

These metaphorical approaches did not help to clarify the situation. The existence of constitutionally suffi-

cient causation does not hinge on keys, doors, or locks. We do not adjudicate imagined hypotheticals or magical metaphors—we must decide the case presented to us. The only relevant question is whether there was a "reasonable probability" that DOT's promulgation of the regulations would result in increased pollution and adverse health effects to Public Citizen and its members.

Even before the recent presidential action, we would have had to conclude that it was reasonably likely that after these regulations became effective, the President would lift the moratorium. "[W]hen standing hinges on choices made by a third party, [a] plaintiff must 'adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressibility of injury.'" *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir. 1994) (quoting *Defenders of Wildlife*, 504 U.S. at 562, 112 S. Ct. 2130). Public Citizen pointed to the introductory text of the regulations, in which DOT stated that it was issuing the regulations "in anticipation of a presidential order lifting the current statutory moratorium on authorizing such operations." Application Rule, 67 Fed. Reg. at 12,702. Public Citizen also pointed to the finding of the NAFTA arbitral panel that the United States' consistent refusal to allow entry to Mexican trucks violated the treaty, and the President's consequent announced intent to modify the moratorium once the regulations were issued.

The argument the other way, however, had some force. "[I]t usually is difficult to establish causation and redressibility when a plaintiff's alleged injury depends on the actions of a third party not before the court." *Yesler Terrace*, 37 F.3d at 446. The Supreme Court

tells us that an acceptable causation analysis cannot rely on "the independent action of some third party not before the court." *Bennett*, 520 U.S. at 167, 117 S. Ct. 1154. Certainly the President is an independent actor. Nevertheless, we find dispositive the lower threshold for causation in procedural injury cases, which often involve third parties whose independent actions are necessary for constitutional injury to occur.

For instance, to use the Supreme Court's example, a person

> living adjacent to the site for a proposed construction of a federally licensed dam has standing to challenge mental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years,

Defenders of Wildlife, 504 U.S. at 572 n. 7, 112 S. Ct. 2130, and, perhaps more importantly, even though there can be no certainty that the company will ever build the dam even were the license granted. Certainly the fact that the dam construction company applied for a license is an indication that it wishes to build the dam, but a myriad of circumstances—financial, political, or meteorological—could intervene to prevent it from actually following through with its plans. Nevertheless, the Supreme Court considers such a case to contain the requisite level of causation, because it is a procedural injury case, requiring only a "reasonable probability" of causation.

Here, the President of the United States had committed himself to a course of action to which the United States was obligated under an important international

treaty, passage of which was hard-fought and not without controversy, and as to which it was then in default. There were, of course, a number of developments that could have changed the President's mind on this issue—political, diplomatic, military, or economic—but that cannot detract from his announced intent to comply with the treaty (at least as far as this standing analysis is concerned). President Bush's public statement that he would lift the moratorium is sufficient for these purposes. Thus, it is no metaphysical exercise to conclude that it was reasonably probable, even before the action actually occurred, that the President would rescind the moratorium.

We must next look at the likelihood of harm to Public Citizen if it does not prevail in this action. If Public Citizen's petition is denied, then there is nothing to keep the regulations from going into effect. Once this occurs, Mexico-domiciled truck companies will apply for licenses to operate in the United States beyond the border zone, Application Rule, 67 Fed. Reg. at 12,714 (creating 49 C.F.R. § 365.503), and DOT will issue permits to those companies that satisfy the requirements of the challenged regulations, *id.* at 12,715 (creating 49 C.F.R. § 365.507). Those companies will then begin to operate their trucks in the United States, emitting pollutants that contaminate the air Public Citizen's members breathe and that could potentially cause them myriad adverse health effects. Although DOT and Public Citizen dispute the number of Mexican trucks that will in fact be granted entry, and the quantity of consequent pollutant emissions, both agree that at least *some* Mexico-domiciled trucks will enter the United States if the regulations are put into effect, and at least *some* pollutants will be emitted. This is a sufficient

causal link between DOT's acts and Public Citizen's alleged injury.

C. Redressability

The third prong of the constitutional standing inquiry requires us to determine whether we possess the ability to remedy the harm that a petitioner alleges. In most procedural injury cases involving environmental analysis, a petitioner "who asserts inadequacy of a government agency's environmental studies . . . need not show that further analysis by the government would result in a different conclusion. It suffices that . . . the [agency's] decision *could be influenced* by the environmental considerations that [the relevant statute] requires an agency to study." *Hall*, 266 F.3d at 977 (emphasis added). Thus, Public Citizen bears a relatively easy burden. If DOT conducted the type of environmental analysis that Public Citizen suggests, its decision could be influenced. Indeed, DOT is required by statute to "insure that . . . environmental amenities and values . . . be given appropriate consideration in [administrative] decisionmaking." 42 U.S.C. § 4332(2)(B).

As the case now stands, if we grant Public Citizen's petitions, no Mexico-domiciled trucks will be permitted into the United States beyond the border zones until DOT conducts the required analyses; and if we deny the petitions, Mexico-domiciled trucks will be permitted into the United States as soon as they complete the registration and certification process provided in the challenged regulations. Thus, the case presents the very paradigm of constitutional redressability: Public Citizen will suffer harm if we deny its petitions, but the harm will be avoided entirely if we grant the petitions.

D. Organizational Standing

A further necessary standing inquiry is whether Public Citizen is entitled to bring suit on behalf of its members. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181, 120 S. Ct. 693 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977)). We conclude that Public Citizen has organizational standing. It has adequately alleged injury to its members. The interests at stake—potential adverse health consequences due to increased pollution from diesel truck exhaust—are pertinent to the interests of environmental organizations and other organizations concerned with the physical well-being of their membership. Finally, there is no indication that resolving this case would require, or even be assisted by the participation of individual members of Public Citizen.

E. Statutory Standing Under the APA

In addition to constitutional standing, a petitioner who:

> brings a statutory enforcement action under the [APA] must meet its statutory requirements for standing. [A petitioner] must establish (1) that there has been final agency action adversely affecting [it], and (2) that, as a result, it suffers legal wrong or that its injury falls within the "zone of interests" of the statutory provision the [petitioner] claims was violated.

Churchill County, 150 F.3d at 1078 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990)) (internal citations omitted), *as amended*, 158 F.3d 491 (9th Cir. 1998). Public Citizen satisfies the first requirement. Though the regulations at issue are styled as "Interim Final Rule[s]," *see, e.g.*, Application Rule, 67 Fed. Reg. at 12,702, the term "interim" refers "only to the Rule's intended duration—not its tentative nature," *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268-69 (D. C. Cir. 1996) ("Any other construction would suggest that the . . . publication [of the rule] was without legal significance at all (a senseless repetition of the notice of proposed rulemaking).").

As for the second prong, we have held that the APA "require[s] that the 'interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970)). As might be expected, "'NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions.'" *Id.* (quoting *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996)). Here, Public Citizen is attempting to protect the environment. Indeed, many of the Petitioners and Petitioners-Intervenors in this case are environmental organizations, or general public interest organizations like Public Citizen that "fight[ ] for a broad range of public interest issues[,][m]any of [which] relate directly or indirectly to environmental concerns." DOT claims that some of the other Petitioners, labor

and trucking organizations—whose standing is irrelevant in any instance—are alleging impermissible economic injuries, but this does not eliminate standing as long as they *also* assert economic/ health concerns. *See id.* at 1158-59.

* * *

In response to our post-argument request for briefing on the significance of the President's modification of the moratorium, DOT makes two additional arguments, neither of which has merit. It first suggests that were we to grant Public Citizen the relief it seeks, that would be tantamount to enjoining Presidential action. We disagree. The President of the United States is not a party to this action, and the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c). We similarly reject DOT's assertion that the relief Public Citizen seeks will somehow affect NAFTA's viability. Again, neither the validity of nor the United States' compliance with NAFTA is before us. Our task here is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by DOT before promulgating the three regulations.

Thus, we conclude that Public Citizen has standing to bring these petitions.

IV. STANDARD OF REVIEW

Review of agency action to determine its conformity with NEPA and the CAA provisions at issue is governed by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th

Cir.2000) (NEPA); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D. C. Cir. 2002) (CAA); *see also City of S. Pasadena v. Slater*, 56 F. Supp.2d 1106, 1134-35 (C. D. Cal. 1999) (CAA review uses same standard as NEPA review). The reviewing court must determine that agency actions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In considering whether an agency acted in an arbitrary and capricious manner, a court "must determine whether the agency articulated a rational connection between the facts found and the choice made." *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001). Furthermore, courts must "carefully review the record to 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors,'" *id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L.Ed.2d 377 (1989)), and may not "'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute,'" *id.* (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92, 85 S. Ct. 980, 13 L.Ed.2d 839 (1965)) (omission in original).

In the context of the procedural environmental requirements imposed by NEPA and CAA, "[t]he arbitrary and capricious standard requires a court to ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors." *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (internal quotation marks omitted),

cert. denied, 534 U.S. 815, 122 S. Ct. 41, 151 L.Ed.2d 14 (2001). A reviewing court is not permitted to substitute its judgment for that of the agency, but rather must "'simply . . . ensure that[the agency] has adequately considered and disclosed the environmental impact of its actions.'" *Am. Rivers v. FERC*, 201 F.3d 1186, 1194-95 (9th Cir. 1999) (quoting *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183 (9th Cir. 1997)). This means that we "must defer to an agency's decision that is fully informed and well-considered," *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (internal quotation marks omitted), but "need not forgive a 'clear error of judgment,'" *id.* (citing *Marsh*, 490 U.S. at 378, 109 S. Ct. 1851), or credit "conclusions that do not have a basis in fact," *Ariz. Cattle*, 273 F.3d at 1236.

V. ENVIRONMENTAL ANALYSIS UNDER NEPA

A. DOT's Decision Not to Prepare an EIS

We next determine whether DOT acted in an arbitrary and capricious manner when it failed to prepare an Environmental Impact Statement on the basis of its Environmental Assessment. By its own terms, NEPA intended to reorganize the priorities of the federal government, to integrate "environmental amenities and values" alongside more traditional "economic and technical considerations." 42 U.S.C. § 4332(2)(B). Congress directed that the statute and its implementing regulations be used toward this end in government decisionmaking "to the fullest extent possible." *Id.* § 4332.

To achieve its goal of including environmental concerns in government decisionmaking, NEPA requires that an EIS be prepared for all "major Federal actions

significantly affecting the . . . human environment." *Id.* § 4332(2)(C). In certain circumstances, agencies may first prepare an EA to make a preliminary determination whether the proposed action will have a significant environmental effect. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4), *cert. denied*, 534 U.S. 1104, 122 S. Ct. 903, 151 L.Ed.2d 872 (2002). "If the EA establishes that the agency's action '*may* have a significant effect upon the . . . environment, an EIS must be prepared.'" *Id.* (quoting *Found. for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982)) (emphasis and alteration in original). "If not, the agency must issue a Finding of No Significant Impact (FONSI), accompanied by 'a convincing statement of reasons to explain why a project's impacts are insignificant.'" *Id.* (quoting *Blue Mountains*, 161 F.3d at 1212) (internal citations and quotation marks omitted).

Thus, to decide whether an EIS is required, we must determine: (1) whether the challenged rules constitute "major" federal actions; and (2) whether they may significantly affect the environment. We find that DOT's rules are major federal actions that may significantly affect the environment, and thus we hold that DOT acted in an arbitrary and capricious manner in failing to prepare an EIS for the challenged regulations.

1. *"Major Federal Action"*

The Council on Environmental Quality ("CEQ"), a body established by NEPA, 42 U.S.C. §§ 4342- 4347, has issued regulations implementing NEPA. We rely on these regulations to "guide our review of an agency's

compliance with NEPA," *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 n. 1 (9th Cir. 2002), and the Supreme Court has held that they are entitled to substantial deference, *Marsh*, 490 U.S. at 372, 109 S. Ct. 1851. The relevant CEQ regulations implementing NEPA define "major Federal action[s]" as "actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "[a]doption of official policy, such as rules, regulations, and interpretations." 40 C.F.R. § 1508.18. DOT, of course, does not dispute that its actions are "federal," but does dispute Petitioners' allegations regarding the regulations' "effects." DOT alleges that the effects of the Application and Safety Rules are limited to the increased diesel emissions of Mexican trucks during the road-side inspections and safety monitoring mandated by the regulations. It thus predicts that there will be no increase in Mexican truck traffic resulting from the regulations. DOT's analysis goes on to suggest that even if such an increase might occur, its effects would not require consideration because it would be a result of presidential rescission of the moratorium, not the regulations themselves. This novel parsing of the regulations' effects fails to meet NEPA standards.

DOT's argument here echoes its earlier causation argument in the standing context. It is equally unavailing here for a similar reason. The CEQ regulations make clear that the "effects" of federal actions include "[i]ndirect effects, which are caused by the action and are later in time . . . but are still reasonably foreseeable," *id.* § 1508.8(b), as well as "[c]umulative impact . . . which results from the incremental impact of the action when added to other . . . reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions," *id.* § 1508.7.

We have already concluded that the President's rescission of the moratorium was "reasonably foreseeable" at the time the EA was prepared and the decision not to prepare an EIS was made. *Cf. Native Ecosystems*, 304 F.3d at 896 (holding that a memorandum that "evidences a decision to consider . . . seriously" taking certain actions renders those actions "reasonably foreseeable"). To restrict consideration of the regulations' "effects" in the way DOT proposes would contravene not only the plain language of the CEQ regulations, but also the statutory command of NEPA, that environmental effects of government action be considered "to the fullest extent possible." 42 U.S.C. § 4332.

As for the requirement that the federal action be "major," the CEQ regulations tell us that "[m]ajor reinforces 734 but does not have a meaning independent of significantly," 40 C.F.R. § 1508.18, meaning that a federal action is "major" whenever it has "significant" environmental effects. *See City of Davis v. Coleman*, 521 F.2d 661, 673 n. 15 (9th Cir. 1975).

2. *"Significantly Affecting the Human Environment"*

The CEQ regulations also define the crucial term "significantly," to clarify the situations in which an agency must prepare an EIS:

> "Significantly" as used in NEPA requires considerations of both context and intensity:
>
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as

society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short-and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. . . . The following should be considered in evaluating intensity:

. . . .

(2) The degree to which the proposed action affects public health or safety.

. . . .

. . . .

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

. . . .

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27. If DOT's action is environmentally "significant" according to *any* of these criteria, then DOT erred in failing to prepare an EIS. *See Nat'l Parks*, 241 F.3d at 731. An examination of these criteria reveal that the challenged regulations are

environmentally "significant," and an EIS should have been prepared.

(a) *Context*

The CEQ regulations explain that the proposed federal action must be analyzed with regard to several contexts—national, regional, and local—as well as by looking at the short- and long-term effects of the proposed action. Measured against this standard, DOT's EA is woefully inadequate. The EA calculates likely emissions increases if the Application and Safety Rules are implemented. It dismisses those increases as insignificant, however, because they are "very small relative to national levels of emissions." It does not conduct any analysis regarding whether these increases may be localized in certain areas near the Mexican border, including such likely destinations as Southern California or Texas.

Amicus ATA considers it "unreasonable" that DOT should have to "make a determination of the expected routes of 34,000 hypothetical [Mexican trucks]." Regardless of the law's "reasonableness" (a question properly addressed by Congress—not us), this is precisely what NEPA and the CEQ regulations require. The law requires DOT to consider the most likely localities to be affected by increased Mexican truck traffic and to perform more localized analyses for these areas. Indeed, comments submitted to FMCSA during the notice-and-comment period analyzed publicly available government data to predict, not surprisingly, that major cities near the Mexican border would likely suffer the greatest environmental impact as a result of the regulations. The fact that commenters performed such an analysis does not indicate that their analysis

was correct, but rather that it was possible to conduct such an analysis. DOT's failure to do so indicates that it did not take a sufficiently "hard look" at the environmental effects of its actions or at the public comments it received.

Furthermore, DOT failed to address adequately the long-term effects of its actions. In conducting its EA, DOT limited its analysis to the environmental impact of Mexican trucks in the year 2002. This is anomalous in itself, considering that the regulations were scheduled to become effective only as of May 3, 2002. More significantly, the EA offered no projections of the increase (or decrease) in Mexican truck traffic after 2002, though the regulations were certainly expected to continue in effect beyond the end of last year; indeed they would be in effect now absent this action.

ATA contends that increases in Mexican truck traffic in years subsequent to 2002 would be attributable to the "success of NAFTA," rather than to the regulations themselves. This argument is beside the point, as it is impossible to separate increases in truck traffic due to the opening of the border from increases in truck traffic due to successful international trade; it is precisely this desired increase in international trade that prompted DOT to issue regulations facilitating cross-border truck traffic in the first place.

Once again, DOT received this very criticism in public comments during its rulemaking process. The commenters used available government data to estimate future increases in Mexican truck traffic after 2002. This alone should have prompted DOT to conduct a long-term analysis, as required by the CEQ regulations, or at the very least, to "convincing[ly] . . . explain" its absence. *Nat'l Parks*, 241 F.3d at 730.

(b) *Intensity*

(i) *Effect on Public Health and Safety*

Petitioners contend that DOT must prepare an EIS, in part due to the potential effect of the challenged regulations on public health and safety. Although we have never discussed this requirement in the context of air pollution, other courts have considered "even [the] marginal degradation of drinking water" to be environmentally significant for purposes of this regulation. *See United States v. 27.09 Acres of Land*, 760 F.Supp. 345, 353 (S. D. N. Y. 1991). The same could easily be said of a "marginal degradation" of the quality of the air we breathe.

The pollutants at issue are oxides of nitrogen ("NOx") and airborne particulate matter ("PM-10"). These compounds are emitted into the air as part of the exhaust fumes of diesel trucks, such as those that are the subject of the challenged regulations. Petitioners-Intervenors have pointed to a wealth of government and private studies showing that diesel exhaust and its components constitute a major threat to the health of children, contribute to respiratory illnesses such as asthma and bronchitis, and are likely carcinogenic. While these studies were not placed in the administrative record, that does not excuse DOT's failure even to consider whether any negative health effects could be associated with increased diesel exhaust emissions.

(ii) *Uncertainty*

If the environmental effects of a proposed agency action are uncertain, the agency must usually prepare an EIS:

> Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent "speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action."

Nat'l Parks, 241 F.3d at 732 (quoting *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988)) (internal citation omitted) (omission in original).

There are a number of areas of uncertainty regarding DOT's EA that merit additional investigation. The most significant of these is whether, and to what extent, cross-border Mexican truck traffic will increase if DOT implements the regulations. A related question is whether, and to what extent, such increased Mexican truck traffic will consist of trucks producing more dangerous emissions than their United States counterparts.

DOT acknowledges that "there are reasons to believe that [increased traffic and pollution] might occur," but it contends that these increases will be smaller than Petitioners suggest. Strangely, despite DOT's "reasons to believe" that such increases will occur, its EA does not address them. In fact, the EA specifically assumed for the purposes of its study that "the implementation of [the regulations] would not affect the trade volume between the United States [and] Mexico." It contends instead that any increases "would be the result of the modification of the moratorium and not the implementation of the [regulations]." Indeed, the EA asserts that the number of Mexican trucks in the United States will likely decrease as a result of the new regulations

alone, because not all existing Mexican trucks currently operating in the border zone could or will comply with them. This illogical parsing of the cause of increased pollution, i.e., that decreases in truck traffic are credited to DOT's action, but the potentially much larger expected increases in the same traffic are attributed to the President's modification of the moratorium, dictates the EA's overall conclusions.

The EA goes on to evaluate the environmental effects of the regulations—attempting to segregate them from those attributable to the rescission of the moratorium—and concludes that the regulations will actually slightly reduce emissions by Mexican trucks within the border zone, and have no significant effect on air quality beyond the border zone, when evaluated on a national scale. This emissions analysis, in turn, is based on the EA's further assumptions regarding the quality and age of the Mexican truck fleet.

The EA assumes, without stating any basis therefore, that it "considered" approximately one-third of Mexican trucks to be identical to United States trucks manufactured after 1994, while considering the remaining trucks identical to United States trucks manufactured in 1986. (More precisely, the EA "considered" 130,000 of 400,000 Mexican trucks to be manufactured after 1994, and the rest in 1986, and then lamented the "significant confounding variable" in its study, that the analysis programs it used "were based on United States vehicles.") These years are significant because 1994 is the year after which Mexican emissions standards became equivalent to United States standards. The year 1986 was selected, according to DOT, because it was the last year when neither Mexico nor the United States had any relevant emissions regulations in place.

There are two problems with this analysis. First, the EA provides no basis whatsoever for its selection of one-third as the proportion of Mexican trucks manufactured after 1994. Other studies, though not part of the administrative record, have concluded that this percentage is closer to 20% (study by the General Accounting Office) or even 10% (private study commissioned by the California Attorney General). While we do not consider such studies to be conclusive, they are at least founded on some analysis of raw data, and based on some ascertainable methodology. The EA, on the other hand, seems to have randomly selected one-third as its preferred proportion, citing no authority or study for that number.

The second analytical defect echoes our concern regarding the EA's failure to consider long-term effects. The United States has already adopted much stricter emissions regulations that will become effective in 2004 and 2007. *See* 40 C.F.R. § 86.004-11 (2004); *id.* § 86.007-11 (2007). In addition, six major United States diesel truck engine manufacturers have entered into consent decrees in the District Court for the District of Columbia in settlement of CAA violations, in which they have agreed to abide by certain of the 2004 emissions regulations as of October 1, 2002. *See, e.g.*, Consent Decree, *United States v. Caterpillar, Inc.*, No. 98-02544(HHK) (D.D.C. 1999). Neither the EA nor DOT cite to any known plans of the Mexican government to tighten its emissions standards beyond those currently in place. Indeed, the EA never even considered this issue because, as discussed above, it limited its analysis to the year 2002. The existence of regulations and consent decrees that will significantly alter the relative environmental impact of Mexican truck

traffic in the near future would further strengthen the need for the EA to have considered future implications of its actions.

Thus, the EA—assuming no increase in Mexican truck traffic, making an arbitrary assumption about the percentage of newer, "cleaner" Mexican trucks on the roads, and failing to take account of future increasing discrepancies in emissions rules—conducted an environmental analysis that found no increase in emissions due to the regulations' implementation. Our law mandates that an agency complete an EIS "where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent 'speculation on potential . . . effects.'" *Nat'l Parks*, 241 F.3d at 732 (quoting *Sierra Club*, 843 F.2d at 1195) (internal citation omitted) (omission in original). Petitioners raise many uncertainties about the EA, as does amicus the Attorney General of the State of California, *see infra*, and there is no suggestion that these uncertainties do not lend themselves to quantification. (Indeed, Petitioners have submitted a number of studies attempting precisely what DOT should have done.)

Once again, we do not wish to dictate the outcome of the analysis that DOT must perform. Perhaps DOT will determine that the new regulations will have only a minor impact—one which will be negligible in light of other factors. In the absence of such analysis, however, we cannot defer to the agency's assessment.

(iii) *Threat of Illegality*

The California Attorney General asserts that DOT failed to take account of California's emissions regulations, which are "more stringent than the federal

standards." In its determination of whether its proposed action is significant, an agency must consider "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10); *accord Sierra Club*, 843 F.2d at 1195. In *Sierra Club*, we faulted the Forest Service's EA for its failure to consider, or even mention, California's water quality standards, which might have been threatened by proposed timber sales. *See Sierra Club*, 843 F.2d at 1195. The same fault is present here. California has mandated the adoption of airborne pollutant standards for the state, Cal. Health & Safety Code § 39606 (West 2002), and has adopted rules setting specific limits for airborne pollutants, including NOx and PM-10, Cal. Code Regs., tit. 17, §§ 70100-200 (2002). Regardless of whether the influx of Mexican trucks will cause the levels of these pollutants to rise beyond California's air quality limits—an issue on which the record before us is insufficient—DOT had an obligation to consider whether its regulations *might* violate these rules.

The California Attorney General also points out that DOT's actions could violate the CAA, thus further triggering the illegality prong of the significance analysis. Because we find that DOT violated the CAA, *see infra*, this further strengthens our conclusion that DOT's actions are environmentally significant for NEPA purposes.

(iv) *Controversy*

"Controversy" sufficient to require preparation of an EIS occurs "when substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor, or there is a substantial dispute [about] the size, nature, or effect of the major Federal action." *Nat'l Parks*, 241 F.3d at 736 (internal citations omitted and alterations in original). The evidence establishing such a controversy must be brought to the agency's attention while the agency is conducting its deliberations, not *post hoc*. *See id.* Thus, the controversy requirement is two-fold: Petitioners must show that there was a "substantial dispute" about DOT's actions and that this dispute raised "substantial questions" about their validity. The burden then shifts to DOT to provide a "convincing" explanation why no controversy exists. *See id.*

Petitioners' claim satisfies the first requirement. We have held that an "'outpouring of public protest'" —where, for example, 85% of public comments opposed the proposed agency action—constitutes a substantial dispute. *Id.* (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1334 (9th Cir. 1992)). Here, "[o]ver 90 percent of the comments opposed" DOT's regulations. Application Rule, 67 Fed. Reg. at 12,704. DOT timely received these comments, and duly noted their existence in the comments accompanying the final regulations. *See id.*

Petitioners' claim also satisfies the second requirement. A substantial portion of the negative comments offered real criticism of DOT's action and its failure to adequately assess its 743 environmental impact. These comments, several of which were made by the future litigants here, as well as by other national environmental organizations, describe many of the defects discussed above. Because many of these criticisms have merit, and DOT failed to adequately account for its failure to act on them, its action is "controversial"

under the CEQ regulations and requires preparation of an EIS.

(c) *Convincing Statement of Reasons*

In sum, Petitioners have successfully demonstrated that DOT's proposed regulations may have a "significant" environmental impact, mandating the preparation of an EIS. DOT has failed to demonstrate that its EA contains anything close to the statutorily required "convincing statement of reasons" sufficient to support a decision not to prepare an EIS. We are similarly unpersuaded by DOT's last-ditch argument that, as an agency with no jurisdiction over environmental matters, it need not consider the environmental consequences of its actions. This argument flies in the face of the text of NEPA, which requires that "*all* agencies of the Federal Government shall. . . . include in every . . . major Federal action[ ] significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332(2) (emphasis added).

One final point regarding the shortcomings of DOT's EA is that its analysis is limited to comparing the status quo (the "Baseline Scenario") to the situation in which the regulations had been implemented (the "Proposed-Action Scenario"). By not considering additional alternatives (such as, for example, proposing more stringent controls on incoming Mexican trucks), DOT further failed to abide by NEPA's statutory command to prepare a "detailed statement . . . on . . . alternatives to the proposed action." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1508.25(b)(2) (defining "[a]lternatives" to include "[o]ther reasonable courses

of actions [sic]"). Indeed, the CEQ regulations state that consideration of alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. "The rule of reason guides 'both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative.'" *Am. Rivers*, 201 F.3d at 1200 (quoting *City of Carmel-by-the Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)). "'[F]or alternatives which were eliminated from detailed study, [an agency must] briefly discuss the reasons for their having been eliminated.'" *Id.* (quoting 40 C.F.R. § 1502.14(a)) (emphasis omitted). Thus, in preparing its EIS, DOT should explore a wider range of alternatives.

B. Categorical Exclusion of the Certification Rule

We next must determine whether DOT acted arbitrarily and capriciously in failing to conduct any NEPA environmental analysis at all for the Certification Rule. DOT contends that this rule falls within an exception to the generally applicable requirements of NEPA. The CEQ regulations allow categorical exclusion of actions "which do not individually or cumulatively have a significant effect on the human environment *and* which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4 (citing 40 C.F.R. § 1507.3) (emphasis added). For such actions, "neither an environmental assessment nor an environmental impact statement is required." *Id.*

Agencies are required to develop guidelines as to which of their actions do or do not require the preparation of an EA or an EIS. *See id.* § 1507.3. FMCSA, as a constituent agency, is subject to DOT's guidelines.

See Dep't of Transp., Order 5610.1C, at ¶ 20(a)(2) (Sept. 18, 1979), *as amended* (July 13, 1982 and July 30, 1985), *available at* http://isddc.dot.gov [hereinafter "DOT Order 5610.1C"]. Individual agencies within DOT are permitted to issue their own guidelines, *id.* ¶ 20(a)(1), but FMCSA has not done so.

Therefore, we must examine DOT's Order to determine whether the Certification Rule falls within those categories of actions that it has "found to have no [environmental] effect." 40 C.F.R. § 1508.4. Paragraph 4(c) of the order specifies the categorical exclusions DOT employs. *See* DOT Order 5610.1C, at ¶ 4(c). The list includes such actions as "[a]dministrative procurements," "[p]ersonnel actions," and "[p]roject amendments (e.g. increases in costs) which do not significantly alter the environmental impact of the action." *Id.* There is no categorical exclusion that seems even plausibly capable of encompassing the Certification Rule.[6] In effect, DOT is arguing that,

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[6] The "categorical exclusions" paragraph of DOT Order 5610.1C reads as follows:

> c. *Categorical Exclusions.* The following actions are not Federal actions with a significant impact on the environment, and do not require either an environmental assessment or an environmental impact statement:
>
> (1) Administrative procurements (e.g. general supplies) and contracts for personal services;
>
> (2) Personnel actions (e.g. promotions, hirings);
>
> (3) Project amendments (e.g. increases in costs) which do not significantly alter the environmental impact of the action;
>
> (4) Operating or maintenance subsidies when the subsidy will not result in a change in the effect on the environment; and
>
> (5) Other actions identified by [individual] administrations as categorical exclusions pursuant to paragraph 20.
>
> (6) The following actions relating to economic regulation of airlines . . . .

DOT Order 5610.1C, at ¶ 4(c). As noted above, FMCSA has not promulgated its own supplemental rules pursuant to ¶ 4(c)(5).

even though the Certification Rule is not subject to any of DOT's categorical exclusions, it should be categorically excluded from the EA/EIS requirement because it has no significant environmental impact. This cannot be the case.

We review an agency's determination that a particular action falls within one of its categorical exclusions under the arbitrary and capricious standard. *Alaska Ctr. for Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999); *see also California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002). "[A]n agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." *Alaska Ctr.*, 189 F.3d at 857. DOT has failed to identify any particular categorical exclusion applicable to the Certification Rule and may not do so *post hoc*. *Norton*, 311 F.3d at 1175. Even if it could, any claim that one of these exclusions applied would be contrary to the plain text of the DOT Order, and thus "inconsistent with the terms used in the regulation," and not entitled to our deference. Thus, DOT acted in an arbitrary and capricious manner by failing to prepare an EIS, or at least in failing to prepare an EA for the Certification Rule and then determining on that basis whether to prepare an EIS.

VI. CONFORMITY DETERMINATION UNDER THE CAA

Petitioners also contend that DOT acted arbitrarily and capriciously in failing to conduct a conformity determination under the CAA. The CAA requires EPA to establish air quality standards for certain pollutants, 42 U.S.C. § 7409, and it has done so with respect to NOx and PM-10, the pollutants most at issue here, 40 C.F.R. § 50.6, .7, .11. Each state, in turn, is required to adopt and submit for EPA approval a State Implementation Plan ("SIP") for each pollutant. 42 U.S.C. § 7410(a)(1). Each state is divided into "air quality control regions," which are classified as "attainment" or "nonattainment" with respect to each pollutant for which there exists an air quality standard. *Id.* § 7407. SIPs must contain emissions limitations and other measures designed to bring "nonattainment" regions into attainment. *Id.* § 7410(a)(2).

To ensure compliance with these plans, the CAA contains a "conformity" requirement, mandating that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." *Id.* § 7506(c)(1). Most federal actions affecting levels of pollutants in nonattainment regions require that the responsible agency conduct a "conformity determination." 40 C.F.R. § 93.150-.160. However, two categories of federal action are exempted from this requirement: (1) "[a]ctions where the total of direct and indirect emissions are below the emissions level specified in [the regulations]," *id.* § 93.153(c)(1); and (2) "[a]ctions which would result in no emissions increase or an increase in emissions that is clearly de

minimis," including "[r]ulemaking and policy development and issuance," *id.* § 93.153(c)(2). DOT argues that its regulations fall within both of the above-listed exceptions: that the total emissions caused by the regulations fall below the specified amount, and that the regulations are categorically excluded from the statutory requirements because they are "rulemaking." We review under the arbitrary and capricious standard an agency's decisions regarding SIP conformity determinations, as well as its decisions that certain projects do not require conformity determinations. *Olmsted Falls*, 292 F.3d at 270.

DOT's assessment that its regulations will cause emissions below the amounts specified in 40 C.F.R. § 93.153(b)(1), thus excusing it from making a conformity determination, is based on the predicted emissions in its EA. As we have already determined, however, DOT failed to conduct a reliable environmental analysis. Because of its illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry, DOT systematically underestimated the emissions that would result from its regulations. Furthermore, there were a number of methodological flaws in DOT's EA, including, most relevantly for CAA purposes, the failure to consider its regulations' environmental impact on a local or regional basis.

The CAA mandates that each state be divided into "air quality control regions," which are evaluated individually as to their compliance with air quality standards. 42 U.S.C. § 7407. Thus, proper CAA analysis must be conducted at the local and regional levels. The national emissions analysis in DOT's EA is inadequate to comply with the CAA. Because DOT is

required to perform a new, more thorough region-by-region environmental analysis to achieve compliance with NEPA, it should also determine, as a result of its new analysis, whether the emissions resulting from its actions will truly fall below the levels established in § 93.153(b)(1). *Cf. Olmsted Falls*, 292 F.3d at 270-73 (holding that petitioners did not meet their burden of proof on whether a conformity determination was required by simply suggesting that it was an "open question" whether the emissions limits would be exceeded).

Second, DOT claims that by listing "[r]ulemaking" as a type of "[a]ction [ ] which would result in no emissions increase or an increase in emissions that is clearly de minimis," 40 C.F.R. § 93.153(c)(2), the EPA intended to exempt *all federal regulations* from the requirements of the CAA. Petitioners respond that the exception encompasses only the process of rulemaking itself, but not the agency's implementation and execution of validly promulgated regulations. A careful reading of the EPA regulations, keeping the statutory purpose in mind, dispenses with DOT's erroneous, albeit novel, assertion.

The first striking element is that "rulemaking" is listed as a type of "[a]ction[ ] which would result in no emissions increase or an increase in emissions that is clearly de minimis." *Id.* If the EPA drafters truly intended to exempt all federal regulations from the conformity determination requirement, they certainly would have been aware that some federal regulations do in fact result in an increase in emissions (or an increase that is not merely de minimis). Indeed, the EPA regulations specify that there are two kinds of

emissions, "direct emissions" and "indirect emissions." *Id.* § 93.152.

Indirect emissions are defined as:

> those emissions . . . that . . . [a]re caused by the Federal action, but may occur later in time . . . from the action itself but are still reasonably foreseeable; and . . . [t]he Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Id. "Caused by" was used to refer to "emissions that would not otherwise occur in the absence of the Federal action." *Id.*

Using the but-for analysis suggested by the EPA regulations, a substantial number of federal regulations would result in emissions above de minimis levels. If the EPA had wished to exclude *all* federal regulations from the scope of this requirement, it easily could have made a bolder statement exempting all federal regulations, *regardless* of whether they cause direct or indirect emissions.

Another clue as to the proper interpretation of the de minimis exception is the fact that the exception is for "rulemaking and policy development and issuance." *Id.* § 93.153(c)(2)(iii). This juxtaposition strongly suggests that Petitioners are correct in arguing that the "rulemaking" exception should apply only to the process of developing and issuing federal regulations, as opposed to the substantive result produced by the actual implementation of the final rules.

Finally, it is relatively easy to imagine federal regulations or "policies" that could have drastic effects

on emissions of regulated substances. Even assuming that it is possible the EPA intended these regulations to exclude such actions from the ambit of the CAA's statutory requirements, such a reading would conflict with the basic command of the statute: "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." 42 U.S.C. § 7506(c)(1). "A federal regulation in conflict with a federal statute is *invalid* as a matter of law." *Watson v. Proctor (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998) (citing *Chem. Mfrs. Ass'n v. Natural Res. Defense Council, Inc.*, 470 U.S. 116, 126, 105 S. Ct. 1102, 84 L.Ed.2d 90 (1985)) (emphasis in original). Consequently, the Supreme Court has held that an agency's interpretation of a regulation that conflicts with the plain language of the statute is entitled to "no deference." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989). Thus, we read the EPA regulation, to preserve its validity, so that the categorical exception encompasses only the "development and issuance" of federal regulations, not the substantive results of their promulgation and implementation.

This conclusion does not conflict with *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D. C. Cir.) (per curiam), *as amended*, 92 F.3d 1209 (D. C. Cir. 1996). In *Environmental Defense Fund*, the D.C. Circuit examined the validity of EPA regulations nearly identical to those here,[7] and specifically concluded that the "de

[7] The *Environmental Defense* decision analyzed 40 C.F.R. § 51.850-.860, which concerned CAA conformity determinations of SIPs with DOT programs under Title 23 of the United States Code

minimis" exceptions were "an appropriate exercise of the EPA's authority, inherent in the statutory scheme." *Id.* at 467. In examining the regulations, the court considered the conclusion "that the categorical exemptions are de minimis [to be] entirely self-evident; the EPA has concluded that these activities 'would result in no emissions increase or an increase in emissions that is clearly de minimis,' and we neither see nor would expect to find any evidence to the contrary." *Id.* (quoting 40 C.F.R. § 51.853(c)(2)). Had the D.C. Circuit been reading the EPA regulations in the manner DOT suggests, it certainly "would expect to find" at least *some* evidence tending to contradict such a premise. Though it did not discuss the "rulemaking" exception specifically, the D.C. Circuit suggests that it would have invalidated the EPA regulation as conflicting with the CAA had the language or context suggested such a broad reading of the regulation. Thus, we decline DOT's suggestion to read the EPA regulation in a way that would tend to under-mine its validity.

VII. CONCLUSION

We have jurisdiction over the petitions for review. We emphasize that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us. The only question before us is whether a federal agency failed to comply with our nation's long-established environmental laws. We hold that the Department of Transportation acted arbitrarily and capriciously in failing to prepare a full Environmental Impact Statement under the National Environmental Protection

or the Urban Mass Transportation Act, 49 U.S.C. §§ 5301-5338, neither of which are implicated in this case.

Act, as well as a conformity determination under the Clean Air Act. Therefore, we grant the petitions, and remand this matter to the Department of Transportation so that it may prepare a full Environmental Impact Statement and Clean Air Act conformity determination for all three regulations.

GRANTED AND REMANDED.

APPENDIX B

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 365

[Docket No. FMCSA-98-3298]

RIN 2126-AA34

Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border

Tuesday, March 19, 2002

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: The FMCSA revises its regulations and form, OP-1(MX), governing applications by Mexico-domiciled carriers who want to operate within the United States beyond the municipalities adjacent to Mexico in Texas, New Mexico, Arizona and California and beyond the commercial zones of such municipalities ("border zones"). This interim rule includes requirements that were not proposed in the NPRM, but which are necessary to comply with the Fiscal Year 2002 DOT

Appropriations Act enacted into law in December 2001. This action is taken in anticipation of a presidential order lifting the current statutory moratorium on authorizing such operations. The form requires additional information about the applicant's business and operating practices to help the FMCSA to determine if the applicant will be able to meet the safety standards established for operating in interstate commerce in the United States. Carriers that previously submitted an application to operate beyond the border zones must submit the updated form. Any Mexico-domiciled motor carrier (of property) that wants to operate within the United States solely within the border zones must apply under separate FMCSA regulations that we are issuing elsewhere in today's Federal Register. The revisions in this action are part of FMCSA's efforts to ensure the safe operation of Mexico-domiciled motor carriers in the United States and implement the 2002 DOT Appropriations Act. This action will ensure that FMCSA receives adequate information to assess an applicant's ability to comply with U.S. safety standards. It requires that all Mexico-domiciled carriers subject to this rule undergo a safety audit before receiving provisional authority to operate in the United States. Therefore, the FMCSA is publishing this action as an interim final rule and is delaying the effective date in order to consider additional public comments regarding pre-authorization safety audits before grants of provisional authority. These changes will result in the FMCSA being able to better maintain an accurate census of Mexico-domiciled carriers operating beyond the border zones.

DATES: This interim final rule is effective May 3, 2002. We must receive comments by April 18, 2002.

ADDRESSES: You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001 FAX (202) 493-2251, on-line at http://dmses.dot.gov/submit. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at http://dms.dot.gov/search.htm and typing the last four digits of the docket number appearing at the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. FMCSA may, however, issue a final rule at any time after the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Joanne Cisneros, (909) 653-2299, Transborder Office, FMCSA, P.O. Box 530870, San Diego, CA 92153-0870. Office hours are from 7:45 a.m. to 4:15 p.m., p.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Before 1982, Mexico-domiciled motor carriers could apply for authority to operate within the United States by filing an application for such authority with the former Interstate Commerce Commission (ICC). Under the Bus Regulatory Reform Act of 1982 (the Act), Congress imposed a 2-year moratorium on the issuance of new grants of U.S. operating authority to motor carriers domiciled in a contiguous foreign country, or owned or controlled by persons of a contiguous foreign country. The legislation authorized the President to remove or modify the moratorium upon a determination that such action was in the national interest. The Act was developed in response to complaints that neither Mexico nor Canada were permitting U.S. motor carriers the same access to their markets as Mexican and Canadian motor carriers had to U.S. markets. While the trade issues with Canada were resolved quickly, resulting in the moratorium being lifted for Canada-domiciled motor carriers, the trade issues with Mexico were not addressed until the North American Free Trade Agreement (NAFTA) was negotiated in the early 1990s. Legislative and executive extensions have maintained the moratorium for Mexico-domiciled motor carriers since 1982.

A number of Mexico-domiciled motor carriers have been permitted to operate in the United States because they are not covered by the moratorium. The moratorium only applies to new grants of operating authority. Thus, the operations of Mexico-domiciled motor carriers that had obtained unrestricted operating authority before the moratorium was enacted were

unaffected by the moratorium. Additionally, access has been allowed for certain motor carriers whose operations fell outside the ICC's licensing jurisdiction. These carriers receive Certificates of Registration by filing Form OP-2 under the provisions of what is now 49 CFR part 368. These carriers include those that operate solely within the border zones. Also included among these are certain types of carriers whose operations are not restricted to the border zones: U.S.-owned, Mexico-domiciled private carriers; U.S.-owned, Mexico-domiciled carriers of exempt goods; and Mexico-domiciled carriers that only traverse the United States to deliver or pick up cargo or passengers in Canada.

The terms of NAFTA, Annex I, provide that the United States would incrementally lift the moratorium on licensing Mexico-domiciled motor carriers to operate beyond the border zones. Pursuant to the first phase of NAFTA, on January 1, 1994, the President modified the moratorium and the ICC began accepting applications from Mexico-domiciled passenger carriers to conduct international charter and tour bus operations in the United States. In December 1995, ICC promulgated a rule and a revised application form for the processing of Mexico-domiciled property carrier applications. These rules anticipated the implementation of the second phase of NAFTA, providing Mexico-domiciled property carriers with access to the four U.S. States bordering Mexico, and the third phase, providing access throughout the United States. The ICC designated the revised application form OP-1(MX).

Through the ICC Termination Act of 1995 (ICCTA), Congress authorized the President to remove or modify the moratorium upon the President's determination that such action is consistent with United States obliga-

tions under a trade agreement or with United States transportation policy. The ICCTA also dissolved the ICC and transferred the authority to issue new grants of U.S. operating authority for motor carriers and some other of its regulatory functions to the Secretary of Transportation, who delegated this authority to the Office of Motor Carriers (OMC) of the Federal Highway Administration (FHWA).

On December 15, 1995, the International Brotherhood of Teamsters (Teamsters) sought an emergency stay of the ICC rule in the United States Court of Appeals for the District of Columbia. The Teamsters contended that the ICC rule was arbitrary and capricious because it failed to address concerns regarding the safe operation of Mexico-domiciled motor carriers. In their comments on the ICC rule, the Teamsters had requested the ICC to add additional safety questions to the applications filed by Mexico-domiciled carriers to ensure that the applicants were willing and able to comply with applicable safety regulations.

On December 18, 1995, the Secretary of Transportation announced an indefinite delay in implementing the NAFTA motor carrier access provisions. The Court of Appeals subsequently denied the Teamsters' request for an emergency stay of the ICC rule, which became an FHWA regulation upon the termination of the ICC, and set the case for briefing and argument. After the Teamsters' case was briefed and argued, the court ordered the case held in abeyance until the Department decided to commence processing applications of Mexico-domiciled motor carriers seeking authority to operate beyond the border zones. Approximately 190 Mexico-domiciled carriers have filed OP-1(MX) applications with the Department.

Mexico filed complaints against the United States under NAFTA's dispute resolution provisions, challenging the United States' decision to deny further trucking, investment, and bus access. An arbitration panel comprised of five individuals with international trade expertise chosen by the United States and Mexico met in May 2000 to hear the trucking and investment case. The parties engaged in extensive pre- and post-hearing briefing on safety and legal issues.

The panel issued a final report on February 6, 2001, that unanimously concluded that the blanket refusal to process applications of Mexico-domiciled motor carriers seeking U.S. operating authority out of concerns over the carriers' safety was in breach of NAFTA obligations of the United States, specifically NAFTA's provisions ensuring national treatment and most-favored-nation treatment for cross-border services. The panel also unanimously decided that the United States' refusal to permit Mexican nationals to invest in U.S. enterprises that provide transportation of international cargo within the United States violated the United States' NAFTA obligations. In June 2001, the President lifted this part of the moratorium.

With respect to its decision on the U.S. refusal to implement NAFTA's truck access provisions, the panel stated that it did not disagree that truck safety is a legitimate regulatory objective and that it was not limiting U.S. application of its truck safety standards to Mexican carriers operating in the United States provided that they are applied in a manner that is consistent with the United States' NAFTA obligations. The panel noted that compliance with NAFTA obligations did not require the granting of operating authority to Mexican trucking companies that might be unable

to comply with U.S. safety regulations. The panel observed that the United States might not be required to treat applications for operating authority from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as the applications are reviewed on a case-by-case basis. The panel stated that to the extent that Mexican licensing and inspection requirements might not be like U.S. requirements, the United States might be justified in using methods to ensure Mexican carrier compliance with the U.S. regulatory regime that differ from those used for U.S. and Canadian carriers, provided that such different methods are used in good faith to address legitimate safety concerns and fully conform with all relevant NAFTA provisions.

It is important to note that this interim final rule and the two related rules published elsewhere in today's Federal Register represent only part of the FMCSA's effort to ensure the safe operation of Mexico-domiciled motor carriers in the United States. For example, Mexico-domiciled motor carriers, their vehicles, and their drivers operating in the United States have been and will continue to be subject to all of FMCSA's safety requirements, inspection procedures, enforcement mechanisms, and fines and out-of-service orders. In addition to being subject to the various safety audits and compliance reviews contained in these rules, these carriers and their vehicles and drivers will continue to be subject to roadside vehicle inspections performed at the border and throughout the United States by FMCSA inspectors and their State partners. FMCSA has received additional funding from Congress to enhance its inspection capabilities at the border. The FMCSA is also conducting seminars in Spanish for

Mexican carriers to help ensure that they understand U.S. safety requirements. FMCSA personnel also expect to continue their cooperative efforts with their Mexican Government counterparts toward enhancing Mexico's motor carrier regulatory regime.

The DOT's Research and Special Programs Administration (RSPA) has made considerable progress in harmonizing the hazardous materials standards of the United States and Mexico. Though Mexican hazardous materials standards are not as comprehensive as U.S. standards, those in place are compatible with U.S. standards.

RSPA has also made significant strides in educating Mexico-domiciled hazardous materials shippers and carriers in hazardous materials safety. In 1993, it translated the U.S. Emergency Response Guide into Spanish. Since then, Mexican emergency response information requirements have been harmonized with existing U.S. emergency response information requirements. The U.S., Mexican and Canadian Governments now jointly issue an Emergency Response Guide. RSPA has also translated various hazardous materials brochures and pamphlets into Spanish as well as identified free hazardous materials industry resources to assist the Mexican Government's Secretaria de Comunicaciones y Transportes (SCT) in providing hazardous materials and emergency response training for its inspectors.

Section 350 of the 2002 DOT Appropriations Act, Public Law 107-87 (Act), prohibits the Secretary of Transportation from obligating or expending funds for reviewing or processing applications of Mexico-domiciled motor carriers for authority to operate beyond the United States municipalities and com-

mercial zones on the United States-Mexico international border until the FMCSA and DOT complete several enumerated actions. Many of the requirements of the Act have been incorporated into this interim final rule and the two companion rules published elsewhere in today's Federal Register. Under this interim final rule FMCSA will: (1) Conduct safety examinations or audits on Mexico-domiciled carriers seeking authority to ope ate beyond the border zones encompassing the nine areas of inquiry required by section 350(a)(1)(B); (2) assign a distinctive U.S. DOT number to each Mexico-domiciled motor carrier operating beyond the border zones, in accordance with section 350(a)(4); (3) require Mexico-domiciled motor carriers operating beyond the border zones to certify that they will have their vehicles inspected by Commercial Vehicle Safety Alliance (CVSA)-certified inspectors every three months, in accordance with section 350(a)(5); and (4) require Mexico-domiciled carriers to provide proof of valid insurance issued by an insurance company licensed in the United States before granting them authority to operate beyond the border zones, in accordance with section 350(a)(8).

FMCSA invites comments about how the interim final rule incorporates these new section 350 provisions into the application and approval process.

Summary of Notice of Proposed Rulemaking (NPRM)

The FMCSA proposed changes to its regulations and application procedures for Mexico-domiciled motor carriers desiring to operate within the United States under the NAFTA liberalized access provisions in the May 3, 2001 Federal Register (66 FR 22371). Appli-

cants wanting to conduct transportation services within the United States beyond the border zones would submit a redesigned Form OP-1(MX). The proposed application solicited information to indicate the nature of the operation, demonstrate the applicant's knowledge of the basic requirements of the Federal Motor Carrier Safety Regulations (FMCSRs) and describe how it intended to comply with these regulations. Furthermore, we proposed to require each applicant to make specific certifications of compliance, such as requiring an applicant to submit verification from the Mexican Government that it is a registered Mexico-domiciled carrier authorized to conduct motor carrier operations up to the United States-Mexico border and that all drivers who operate in the United States have a valid Licencia Federal de Conductor (LFC) issued by the Government of Mexico. The applications would also be subject to the other procedures set forth in part 365 for applications in the OP-1 series (e.g., protests and publication in the FMCSA Register).

Discussion of Comments to the NPRM

In response to the three NPRMs relating to NAFTA implementation, the FMCSA received over 200 comments. Over 90 percent of the comments opposed the safety monitoring system or the border opening. Most of the comments focused on the proposed safety monitoring system (66 FR 22415) and will be fully discussed elsewhere in today's Federal Register. A large percentage of the commenters addressed all three rules together in a single submission that may have been filed in one or all three public dockets. We have carefully considered them and have revised the Form

OP-1(MX) application form and the regulations governing the application process as noted in the preamble sections titled "Discussion of the Interim Final Rule" and "Final Revisions to Form OP-1(MX)." In this section, FMCSA responds to the comments on Form OP-1(MX) (and common elements to Form OP-2) and part 365.

The Friends of the Earth, Natural Resources Defense Council, Sierra Club, and Center for International Law (Friends of the Earth et al.) jointly commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children from environmental and health and safety risks. The International Brotherhood of Teamsters (Teamsters) also expressed this viewpoint. The Friends of the Earth et al. believe that 40 CFR 1501.3(b) requires that if DOT is not certain that an environmental impact statement is required, then it must first prepare an environmental assessment. Regarding compliance with Executive Order 13045, the Friends of the Earth et al. believe that this action presents increased pollution and safety concerns that pose a disproportionate risk to children.

The FMCSA is preparing an agency order to meet the requirements of DOT Order 5610.1C (that establishes the Department of Transportation's policy for compliance with NEPA by the Department's administrations). The FMCSA has conducted a programmatic environmental assessment (PEA) of the three rulemakings in accordance with the DOT Order and the regulations of the Council on Environmental Quality. A discussion of the PEA and its findings and the FMCSA's responsibilities under E.O. 13045 is presented later in the preamble under "Regulatory Analyses and Notices." A copy of the PEA is in the docket to this rulemaking.

The Attorney General for the State of California submitted a comment in which he asserted that the FMCSA would be required to perform a "conformity determination" pursuant to the Clean Air Act (CAA), before finalizing these rulemakings. Under the CAA, Federal agencies are prohibited from supporting in any way, any activity that does not conform to an approved State Implementation Plan (SIP), (42 U.S.C. 7006). EPA regulations implementing this provision require Federal agencies to determine whether an action would conform with the SIP (a "conformity determination"), before taking the action (40 CFR 93.150). The Attorney General asserts that the FMCSA must make a conformity determination before taking final action to implement regulations that would allow Mexican trucks to operate beyond the border. The Attorney General provided technical information to support his assertion that allowing Mexican trucks to operate beyond the border would likely not be in conformity with California's SIP.

We have reviewed our obligations under the CAA, and believe that we are in compliance with the general conformity requirements as implemented by the U.S. Environmental Protection Agency (EPA). EPA's implementing regulations exempt certain actions from the general conformity determination requirements. Actions which would result in no increase in emissions or clearly a de minimis increase, such as rulemaking (40 CFR 93.153(c)(iii)), are exempt from requiring a conformity determination. In addition, actions which do not exceed certain threshold emissions rates set forth in 40

CFR 93.153(b) are also exempt from the conformity determination requirements. The FMCSA rulemakings meet both of these exemption standards. First, as noted elsewhere in this preamble to this rule, the actions being taken by the FMCSA are rulemaking actions to improve FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border. Second, the air quality impacts from each of the FMCSA's rules neither individually nor collectively exceed the threshold emissions rates established by EPA (see Appendix C of the Environmental Assessment accompanying these rulemakings for a more detailed discussion of air quality impacts). As a result, we believe that FMCSA's rulemaking actions comply with the CAA requirements, and that no conformity determination is required.

The American Insurance Association (AIA) commented that the OP-1(MX) form does not make clear the fact that layered insurance filings (primary and excess securities) are acceptable. The AIA suggested modifying the form to make it clear. The FMCSA does not find this modification to be necessary because the acceptability of layered insurance filings is clearly explained in 49 CFR part 387, subpart C.

The International Brotherhood of Teamsters (Teamsters) commented that the financial responsibility section of the form should be modified to make clear that we would not grant provisional operating authority until we receive the appropriate filings for financial responsibility and service of process agents from the applicant and its financial responsibility agent(s). The AFL-CIO's Transportation Trades Department (TTD) commented that various statements and certifications

could be made more understandable. The FMCSA will verify that a carrier has the necessary financial responsibility as part of the pre-authorization safety audit. However, there will be no DOT number issued at that time under which a filing may be made. Therefore, we will permit insurance companies to file evidence of insurance with FMCSA after provisional authority is granted. However, provisional operating authority will not be valid, and the carrier may not operate under that authority, until an insurance filing is made with, and accepted by, the agency. This is consistent with the procedure applicable to U.S. and Canadian carriers required to obtain operating authority under 49 U.S.C. 13901. In a similar vein, we are giving applicants the option of including with the application a notification that a process agent service will electronically file the necessary process agent information within 90 days. As is the case with U.S. and Canadian carriers subject to 49 U.S.C. 13901, a Mexico-domiciled carrier may not operate in the United States until the process agent filing is made with, and accepted by, the agency.

United Parcel Service (UPS) commented that the application and regulations for Mexico-domiciled carriers requesting operating authority should identify express delivery as a separate kind of carrier operation. UPS explains that this distinction would enable the United States to accelerate the timeline for lifting the moratorium for express delivery services, without awaiting action on general trucking.

We do not see the need at this time for the rules to distinguish between express delivery services and general trucking services. We do not expect that the moratorium will be lifted for express delivery services before the lifting of the moratorium on general truck-

ing. In addition, the United States maintains a reservation under the NAFTA on the transportation of goods other than international cargo between points in the United States, and the reservation covers both express delivery services and other motor carrier services.

The Owner-Operator Independent Drivers Association, Inc. (OOIDA) and the California Trucking Association (CTA) recommended that the form specify the additional U.S. laws to which Mexico-domiciled carriers would be subject. The OOIDA commented that since NAFTA requires Mexico-domiciled carriers to comply with U.S. laws and all applicable State laws when operating within the United States, the FMCSA should set forth the particular U.S. laws to which applicants are subject. They believe form references to other laws are too vague and should be more fully enumerated. The CTA recommends modifying the form to require an applicant to certify that it will comply with the laws of other U.S. agencies.

The FMCSA believes that it is beyond the scope of this rulemaking to provide an exhaustive listing and explanation on the OP-1(MX) form of all Federal and State laws to which carriers are subject when operating within the United States. However, we are conducting information sessions for potential applicants where, among other things, we discuss additional information provided by other Federal agencies and State registration requirements. This information will also be on the FMCSA web site.

We have worked closely with other Federal agencies, including the U.S. Department of Labor (DOL), U.S. Environmental Protection Agency (EPA) and others, in drafting and clarifying the statement that appears after the signature line of Section VIII—Compliance Certifications. This statement underscores the importance of complying with all pertinent Federal, State, local and tribal statutory and regulatory requirements, including labor, environmental, and immigration laws. Such compliance includes producing requested records for review and inspection. It also includes compliance by drivers who must meet the requirements under the Immigration and Nationality Act, 8 U.S.C. 1101 et seq., and pass inspection by inspectors of the Immigration and Naturalization Service at the port of entry.

The American Trucking Associations, Inc. (ATA), OOIDA, the Teamsters, and the TTD expressed concern that the hazardous materials requirements listed in the safety certification statements were incomplete, suggesting a more comprehensive listing of requirements, including the hazardous material registration requirement. They suggested additional hazardous materials documentation to be submitted with the application. The Transportation Lawyers Association (TLA) believes that the current and proposed application procedures have a loophole regarding identification of hazardous materials carriers. It contends that the "check the block" system, and the fact that none of the information described in the hazardous materials certification statements must be submitted with the application, enable the hazardous materials transporter to escape detection. Neither the form nor application procedures require a carrier who later decides to transport hazardous materials to notify the FMCSA or provide evidence of knowledge of hazardous materials standards—only to increase the amount of insurance carried.

We have corrected and modified the hazardous material certifications in response to these comments.

The hazardous materials certification statements have been revised to more thoroughly reference applicable hazardous materials requirements and request the supplemental information required by the Hazardous Materials Regulations. Please reference the section "Final Revisions to the Form OP-1(MX)" for a detailed discussion of revisions to the certification statements. Information regarding hazardous materials operations will be verified during the pre-authorization safety audit established in this interim final rule pursuant to section 350 of the DOT Appropriations Act.

Section 350 of the Act prohibits Mexico-domiciled motor carriers from transporting hazardous materials in a placardable quantity beyond the border zones until the United States has completed an agreement with the Government of Mexico ensuring that drivers of such placardable quantities of hazardous materials meet substantially the same requirements as U.S. drivers carrying such materials. Section 1012(b) of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA PATRIOT Act) [Pub. L. 107-56, October 26, 2001] amended the Hazardous Materials Transportation Act (49 U.S.C. 5101-5127) and the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. 31301-31317) by placing limitations on the issuance or renewal of hazardous materials licenses. (The DOT interprets the term "hazardous materials licenses" to mean a hazardous materials endorsement for a commercial driver's license because of the reference to section 31305 in section 1012(b).) The OP-1(MX) form will require additional information regarding cargo tank certification, hazardous materials training,

and persons responsible for ensuring compliance with the Hazardous Materials Regulations.

The CTA commented that the FMCSA should distribute an applicant's Single State Registration System (SSRS) filing to the appropriate SSRS members. The FMCSA does not have the resources to coordinate the SSRS filings for Mexico-domiciled carriers. We have also removed specific references to the SSRS from the form instructions (although the requirement still remains), because it is one of many State requirements. We do not wish to imply that the SSRS requirement is the sole State requirement for Mexico-domiciled carriers or that it has greater importance than other laws or regulations.

The TLA commented that the definition of private carrier in the instructions to the application form includes a phrase that has historically described a for-hire carrier and suggests that the form be modified. In Section III of the instructions, a motor private carrier is defined as an entity that is "transporting its own goods, including an entity that is performing such operations under an agreement or contract with a U.S. shipper or other business."

This definition is an attempt to rephrase, in plain language, the text of 49 U.S.C. 13102(7). Section 13102(7) defines foreign motor private carrier to include persons (except motor carriers of property or motor private carriers) that provide interstate transportation of property by motor vehicle under agreements or contracts with persons who are not motor carriers of property or motor private carriers. The form instructions may be confusing because they do not reference the for-hire motor carrier exclusion in defining a

private carrier. Therefore, we have modified the form to provide clarity.

Camara Nacional del Autotransporte de Cargo (CANACAR) commented that we must more fully explain the need for a process agent in the United States and link this requirement directly to safety and NAFTA. CANACAR believes we should require only one process agent in the United States. It commented that requiring more than one would violate NAFTA.

Contrary to CANACAR's suggestion, nothing in the NAFTA limits the rights of the United States to require firms to designate more than one process agent. Requiring Mexico-domiciled carriers to comply with 49 CFR part 366 would not violate NAFTA because the same requirement applies to U.S. and Canadian motor carriers. A process agent service may be used to maintain service of process agents in multiple States, thus eliminating the need for carriers themselves to retain agents in each State. A process agent service is an association or corporation that files with the FMCSA a list of process agents for each State in which the carrier intends to operate.

CANACAR believes that FMCSA must remove registration requirements for agricultural, private, and exempt carriers, because we do not require U.S. and Canadian agricultural, private, and exempt carriers to register under 49 U.S.C. chapter 139.

The Motor Carrier Safety Act of 1984, *Public Law 98-554*, 98 Stat. 2832, required Mexican motor carriers conducting operations otherwise exempt from the economic regulation requirements (i.e., for-hire carriers of exempt commodities, agricultural and private carriers) to register with the Interstate Commerce Com-

mission to conduct operations in the United States. These requirements are an important element of FMCSA's effort to ensure the safe operation of Mexican motor carriers on U.S. highways. From a safety standpoint, there is no distinction between agricultural, private, and exempt carriers and the Mexican carriers that would otherwise be required to register.

CANACAR also believes that the OP-1(MX) and OP-2 form questions about affiliates will violate section 219 of the Motor Carrier Safety Improvement Act (MCSIA), which it interprets to mean that "once NAFTA is implemented" questions about affiliates would no longer be needed. CANACAR commented that section 219 of MCSIA only applies to "carriers" and not "nationals."

The FMCSA will continue to require OP-1(MX) applicants to submit information on affiliations because it is useful in deterring operations by disqualified carriers. Section 219 of MCSIA authorizes FMCSA to penalize and disqualify foreign motor carriers for operating beyond the border zones before the implementation of NAFTA, but it does not prohibit enforcement after NAFTA's implementation (nor the collection of information on a foreign carrier's affiliations). FMCSA requires similar information from U.S. and Canadian applicants to ensure that unsafe carriers do not evade out-of-service orders or registration suspensions by continuing operations under a different identity.

The Free Trade Alliance San Antonio recommends that we provide a sample completed OP-1(MX) form, including attachments, as a guide to applicants. The FMCSA will address this comment in training materials and in our workshops for potential applicants.

The TLA commented that the proposed forms require a carrier operating "small vehicles (GVWR under 10,000 pounds)" to certify that "it is exempt from the U.S. DOT Federal Motor Carrier Safety Regulations * * * ." The TLA believes that the certification does not accurately reflect the accompanying instructions stating that an "exempt" carrier "must certify that [it is] familiar with and will observe general operational safety fitness guidelines and applicable State and local laws relating to the safe operation of commercial motor vehicles." The TLA further commented that the safety certification mentioned in the instructions was originally authored by the ICC in response to comments filed by it in Ex Parte No. 55 (Sub-No. 94), Revision of Application Procedures and Corresponding Regulation, 10 ICC 2d 386, 398-399 (1994). The TLA commented that certification that a carrier who is exempt from the FMCSRs, "will observe" applicable Texas State Law is meaningless. The TLA believes that local law has no ability to influence a carrier's adherence to good highway safety practices beyond its extremely limited reach.

Carriers that are exempt from direct DOT oversight-because they operate smaller vehicles which generally operate only locally and do not pose a significant enough public threat to warrant Federal involvement-are nonetheless subject to State safety oversight. Many MCSAP States have not fully exempted smaller vehicles from their safety oversight and are not required to exempt them under MCSAP. Consistent with the Congressional mandate that safety is our highest priority, the FMCSA will require that OP-1(MX) applicants certify their willingness to inform themselves

concerning any State, local and tribal safety laws to which they are subject and to pledge to abide by them.

The Teamsters commented that instead of the check boxes on the form, we should require narratives describing systems and procedures that the applicant now uses or intends to use in the future. They contend that all applicants should be required to submit accident records with the applications and that "* * * (A)ny responsible carrier would have the information required to compile such a record at the time the application is prepared" even if it had not been maintaining an accident record as such. The TLA recommends that we require a narrative response about the content of an applicant's household goods arbitration program.

The FMCSA will evaluate information provided in the OP-1(MX) form and will conduct a safety audit of each carrier before deciding to grant provisional operating authority and allowing it to commence operations in the United States. Requests for additional narrative descriptions have been restricted to information necessary to evaluate an applicant's willingness and ability to comply with our safety standards and are not meant to be overly burdensome. The FMCSA will not burden Mexico-domiciled carriers with a requirement to provide a narrative description of their household goods arbitration programs because it is not critical to the safety mission of the agency and can be evaluated during the pre-authorization safety audit.

The Teamsters and Public Citizen commented that applicants should complete a proficiency exam testing their knowledge of the FMCSRs as a part of the application procedure, as allowed by MCSIA. The FMCSA does not find it necessary to require a proficiency exam at this time given the detailed require-

ments of this interim final rule. These detailed requirements include the application, including safety certifications, the pre-authorization safety audit, and the requirement in the Act that Mexico-domiciled commercial vehicles be inspected at each border crossing during the time they hold provisional authority and until they hold permanent authority for three consecutive years, unless the vehicles have a current CVSA inspection sticker affixed to the vehicle. Identifying the appropriate company individual to take the proficiency test would be problematic as well. In addition, it is not clear that a proficiency exam requirement would meaningfully enhance safety because it would only test the "proficiency" of a single carrier employee.

The Teamsters also commented that we should require financial reporting based on the Mexico-domiciled applicant's prior year revenue. Since the nature of a Mexico-domiciled carrier's business within Mexico may be unrelated to planned operations within the United States, that information might not be valid for the purpose of evaluating its fitness to operate within the United States. FMCSA also believes this suggestion is outside of the scope of this rulemaking and FMCSA jurisdiction.

Public Citizen believes the proposed application process for Mexico-domiciled trucks will not ensure compliance for several reasons. First, the SCT database to be used in evaluating a Mexico-domiciled carrier's safety fitness is "unpopulated" and "currently lacks the basic information necessary to process applications or to perform a safety review." It proposes as a precondition for granting operating authority that FMCSA set minimum levels of inspection, crash, and other performance and enforcement data to be amassed for an

applicant. For example, there must be sufficient data to calculate a score in Safestat(tm), the information system used to determine a domestic carrier's safety fitness. Public Citizen also believes that information reported on the form may be distorted through error or fraud, and the driver's safety records may not be available. It commented that insurance and proof of insurance requirements are dangerously inadequate to protect other drivers on public highways.

The SCT database inquiry is but one component of the planned safety evaluation of OP-1(MX) applicants. The FMCSA will use information in its own databases and will conduct a pre-authorization safety audit to validate an applicant's responses and assess its safety fitness. Furthermore, the insurance requirements for Mexico-domiciled carriers are identical to those applicable to domestic and Canadian carriers. Minimum levels of financial responsibility are set forth in 49 CFR part 387. The FMCSA will verify proof of financial responsibility during the pre-authorization safety audit. Furthermore, a Mexico-domiciled carrier will be unable to operate in the United States beyond the border zones unless evidence of adequate financial responsibility is filed with the FMCSA by an insurance company licensed in the United States. Evidence of insurance must also be maintained on the motor vehicle when operating within the United States and border inspectors will verify proof of financial responsibility electronically by checking the FMCSA's insurance database.

The CTA commented that applicants should file proof of insurance with the application, rather than after FMCSA grants the applicant operating authority. Current 49 CFR part 387 requires the insurer, not the

applicant, to make insurance filings with the FMCSA. This requirement allows insurance companies to retain control of the insurance certification documents, thereby significantly decreasing opportunities for fraudulent activity. Section 350(a)(8) of the Act, however, requires the FMCSA to verify proof of financial responsibility with a financial responsibility provider licensed in the United States during the pre-authorization safety audit. Although FMCSA will independently verify a Mexico-domiciled motor carrier applicant's proof of financial responsibility during the pre-authorization audit, the carrier will not have been issued a DOT number under which a filing may be made. Therefore, we will not require actual filing of the insurance at the time of the audit. However, once the carrier is granted provisional operating authority, it must have evidence of acceptable insurance on file with the FMCSA before it may operate within the United States.

A number of parties, including OOIDA, Public Citizen, and the Teamsters, urged that Mexico-domiciled motor carriers should not be allowed to operate beyond the border zones at this time, citing what they view as an inadequate Mexican Government motor carrier safety infrastructure, inadequate inspection facilities at border crossings, and other factors. The Teamsters, for example, note that for these reasons full implementation of NAFTA's motor carrier access provisions is premature and urge FMCSA to "postpone the border opening."

FMCSA believes that the regulations being published today, and the other safety measures the agency is taking with respect to Mexico-domiciled motor carriers operating outside the border zone, will give the agency sufficient assurance that these carriers are

capable of complying with U.S. safety standards, notwithstanding any shortcomings in the Mexican Government's motor carrier safety infrastructure. FMCSA also believes that, in conjunction with its State partners, it will be able to maintain an adequate safety inspection program at the border. It should be noted, however, that these and other comments urging a delay in the implementation of NAFTA assume that the regulations published today "open the border" or lift the current moratorium on the granting of operating authority. The regulations do neither. The President, not the FMCSA, has that authority pursuant to 49 U.S.C. 13902. The President has announced that the United States will comply with its NAFTA obligations regarding Mexico-domiciled motor carrier access in a manner that will not weaken motor carrier safety. The regulations help ensure motor carrier safety in anticipation of presidential action lifting the moratorium.

In addition, section 350(c)(1) of the Act requires the DOT Inspector General (OIG) to conduct a comprehensive review of FMCSA border operations before the FMCSA may spend any Federal funds to review or act on OP-1(MX) applications. The OIG must assess whether the statutory requirements have been met to ensure the opening of the border does not pose an unacceptable safety risk to the American public. Section 350(c)(2) also requires the Secretary of Transportation to certify in writing in a manner addressing the Inspector General's findings that the opening of the border does not pose an unacceptable safety risk to the American public before the FMCSA may spend any Federal funds to review or act on OP-1(MX) applications.

ABA and Greyhound urge that we not implement our motor carrier-related NAFTA obligations until Mexico reciprocates by implementing its motor carrier-related NAFTA obligations. Again, none of the regulations published today "open the border" or lift the current moratorium on the grant of operating authority. In any event, NAFTA itself provides procedures to ensure that each party fulfills its obligations under the Agreement.

In response to comments about the need for ensuring that vehicles operated by Mexico-domiciled motor carriers comply with the applicable Federal Motor Vehicle Safety Standards (FMVSS), we note that enforcement of these safety standards by FMCSA and its State partners will be accomplished through roadside inspections, including inspections at the border. Roadside inspections provide a means of ensuring that vehicles meet the applicable FMVSSs in effect on the date the vehicle was manufactured.

Title 49 CFR part 393 of the FMCSRs currently includes cross-references to most of the FMVSSs applicable to heavy trucks and buses. The rules require that motor carriers operating in the United States, including Mexico-domiciled carriers, must maintain the specified safety equipment and features that the National Highway Traffic Safety Administration (NHTSA) requires vehicle manufacturers to install. Failure to maintain these safety devices or features is a violation of the FMCSRs. If the violations are discovered during a roadside inspection, and they are serious enough to meet the current out-of-service criteria used in roadside inspections (i.e., the condition of the vehicle is likely to cause an accident or cause a mechanical breakdown), the vehicle would be placed out of service until

the necessary repairs are made. The FMCSA also has the option of imposing civil penalties for violations of 49 CFR part 393. Any FMVSS violations that involve noncompliance with the standards presently incorporated into part 393 could subject motor carriers to a maximum civil penalty of $10,000 per violation. If the FMCSA determines that Mexico-domiciled carriers are operating vehicles that do not comply with the applicable FMVSSs, this information could be used to take appropriate enforcement action for making a false certification on the application for operating authority.

The FMCSA and NHTSA are initiating several regulatory actions (published elsewhere in today's Federal Register) to ensure that labeling requirements of the FMVSSs are enforced against motor vehicles entering the United States. The FMCSA is proposing to amend the FMCSRs to require that all motor carriers ensure that their CMVs have a certification label that meets the requirements of 49 CFR part 567, applied by the vehicle manufacturer or by a registered importer. United States motor carriers typically would only have access to vehicles that meet the applicable FMVSSs and have a certification label that meets the requirements of 49 CFR part 567, but Mexico-domiciled and Canada-domiciled carriers purchasing vehicles for operation within their respective countries may be using vehicles which have not been certified as FMVSS-compliant.

The FMCSA is proposing that U.S. motor carriers comply with the certification label proposal on the effective date of the FMVSS certification rule. The agency is also proposing that foreign motor carriers that begin operations in the United States on or after the effective date of the certification label rule, or

expand their operations to go beyond the border zones for the first time, ensure that all CMVs used in the new or expanded operations have the necessary certification label before entering the United States. All other Canada and Mexico-domiciled motor carriers operating in the United States prior to the effective date of the interim final rule would be allowed 24 months to bring their vehicles into compliance with the certification requirements.

NHTSA is taking three separate actions relating to the certification label. The first action is publication of a policy statement that addresses commercial motor vehicles that were not originally manufactured for sale in the United States, and thus were not required at the time of manufacture to be certified as complying with the FMVSSs, but are subsequently sought to be imported into the United States. The statement provides that a vehicle manufacturer may, if it has sufficient basis for doing so, retroactively apply a label to a commercial motor vehicle certifying that the vehicle complied with all applicable FMVSSs in effect at the time it was originally manufactured.

NHTSA recognizes that there are many commercial motor vehicles used by motor carriers in Mexico and Canada that were manufactured in accordance with the FMVSSs, but were not certified as complying with those standards because the vehicles were manufactured for sale in Canada or Mexico. NHTSA is proposing two additional actions related to the FMVSS and foreign-domiciled motor carriers. The first would establish recordkeeping requirements for foreign manufacturers that retroactively certify vehicles. The second would codify, in 49 CFR Part 591, its long-standing interpretation of the term "import," as used in

the National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563, to include bringing a commercial motor vehicle into the United States for the purpose of transporting cargo or passengers.

Discussion of the Interim Final Rule

The FMCSA has made changes in this interim final rule to the proposed revisions to part 365, based on the comments, section 350 of the 2002 DOT Appropriations Act, and our own review of the proposal.

Section 365.503 has been revised to allow both hard copy and electronic submission of required information on designation of process agents (Form BOC- 3) as part of the application process. The FMCSA currently allows only process agent services to electronically file the Form BOC-3. If a carrier elects to use a process agent service, it must include a letter to that effect with the Form OP-1(MX) and ensure that the service electronically files the Form BOC-3 with the FMCSA. Otherwise, the hard copy Form BOC-3 must accompany the application. The carrier may not begin operations until the Form BOC-3 has been filed with the FMCSA.

Section 365.505 has been revised to extend to 18 months the deadline for filing Form OP-1(MX) by carriers holding a Certificate of Registration issued before April 18, 2002, authorizing operations beyond the municipalities along the U.S.-Mexico border and beyond the commercial zones of such municipalities. These carriers, as well as those carriers who filed the previous version of the OP-1(MX) application form, do not need to submit another fee when filing a new OP-1(MX) application. The FMCSA may suspend or

revoke the Certificate of Registration of any carrier that fails to comply with this re-registration requirement and 18-month deadline. Certificates of Registration issued before April 18, 2002, will remain valid until the FMCSA acts on the newly submitted OP-1(MX) application.

The FMCSA has revised the heading of § 365.507 in both the table of sections and the regulatory text to "FMCSA action on the application" to accurately reflect how the FMCSA will consider and act on each application. The section now provides that the FMCSA will validate all data and certifications in an application with information in its own databases, in the appropriate databases of the Mexican Government to which it has access as part of the NAFTA implementation process, and with information discovered during a pre-authorization safety audit. The FMCSA will grant provisional operating authority if it determines that the application and the results of the safety audit are consistent with the FMCSA's safety fitness policy. The safety fitness criteria published in new Appendix A to part 365 for the pre-authorization safety audit is similar to the safety fitness criteria for post-operational safety audits for Mexico-domiciled carriers in new Appendix A to part 385 that is being published elsewhere in today's Federal Register. We will also assign a distinctive USDOT Number that distinguishes the carrier as a Mexico-domiciled carrier authorized to operate beyond the border zones.

In the companion rule establishing a safety monitoring system for new entrant Mexico-domiciled carriers (published elsewhere in today's Federal Register), FMCSA will require commercial motor vehicles to have a valid CVSA inspection decal denoting a successful

inspection of the commercial motor vehicle at all times while operating under provisional operating authority in the United States beyond the border zones. Provisional authority to operate beyond the border zones cannot become permanent for at least 18 months, until the carrier has successfully completed an 18-month safety monitoring program, including a compliance review resulting in the assignment of a Satisfactory safety rating as required by § 350(a)(2) of the 2002 DOT Appropriations Act.

Section 365.511 has been added in response to the 2002 DOT Appropriations Act. This section will require that a Mexico-domiciled carrier must continue to seek out and have CVSA inspectors perform CVSA Level I inspections for the first three consecutive years after being granted permanent operating authority.

We have made conforming amendments to §§ 365.101(h) and 365.105(a). We revised § 365.101(h) to reflect the expanded scope of operations authorized by the Form OP-1(MX)—from Mexico to all points in the United States. The previous reference to the four border States was originally designed to register applicants to operate from Mexico to points only within the border States of California, Texas, Arizona and New Mexico.

There are three revisions to § 365.105(a). First, we have specified that household goods carriers and motor passenger carriers are required to submit the OP-1(MX) when applying to operate within the United States beyond the border zones. The previous regulations generally required motor property carriers to use the form. Next, we removed an obsolete reference to Form OP-1(W) because we do not have authority to register water carriers. Finally, we updated the cross-

reference to filing fee requirements to reflect the recodification of these requirements in 49 CFR part 360.

Revisions to Form OP-1(MX)

The interim final rule reflects numerous typographical corrections and adjustments to the OP-1(MX) application form to make it consistent with the OP-2 form. All requests for supplemental information that must accompany the application are in bold typeface so that they are conspicuous to the applicant. The substantive revisions are discussed below.

The OP-1(MX) application instructions have been revised to discontinue the requirement that applicants submit Internal Revenue Service (IRS) Form 2290, Schedule 1 (Schedule of Heavy Highway Vehicles) with the OP-1(MX) application. Unlike the OP-1(MX) application procedure, taxes imposed by 26 U.S.C. 4481 are assessed annually. The IRS Form 2290 would only provide evidence of compliance for the current year. However, the applicant must still certify compliance with 26 U.S.C. 4481 under Section VIII of the application.

The instructions clarify the definition of "applicant" for purposes of determining who must sign the various certifications and the Section IX—Application Oath.

Next, applicants are cautioned to enter only the city code and telephone numbers when listing Mexican telephone numbers on the form because previous applicants often submitted invalid or incomplete telephone numbers.

Under the Insurance Instructions, we emphasize that although evidence of coverage is not required at the time the application is submitted, a carrier has up 90 days after filing an OP-1(MX) application to submit proof of financial responsibility.

The information on how to receive additional assistance in completing the Forms OP-1(MX) and MCS-150 was revised to list a toll-free telephone number accessible from Mexico. We also updated the information for obtaining assistance with hazardous materials registration procedures and regulations.

The instructions also state that applicants that use a process agent service to designate multiple agents for service of process must attach a letter to the application informing the FMCSA of this option. The applicant must also ensure that the service electronically files the Form BOC-3 with the FMCSA within 90 days after submitting the application. The applicant is also notified that it may not begin operations in the United States until the Form BOC-3 has been filed with FMCSA.

The FMCSA has modified Section IA to add a question asking applicants whether they previously held provisional operating authority that was revoked. If that is the case, the applicant must show how it has corrected the deficiencies that resulted in the revocation, explain what effectively functioning basic safety management systems it now has in place, and provide any information and documents that support its arguments.

The FMCSA has corrected references in Section IA, and in the corresponding instructions, to an "SCT registration number." An applicant must be registered

with SCT to be issued operating authority. However, the SCT does not issue an SCT registration number. It uses the RFC number, a Mexican Federal Taxpayer Registration identifier issued by a separate Government agency, to track the carrier's information in the SCT database. A company is issued a Registro Federal de Contribuyente; individuals are issued a Registro Federal de Causante. The applicant must complete Question 5a under Section IA based upon the applicant's form of business: (1) if the applicant is a sole proprietorship, enter the Registro Federal de Causante; (2) all other business forms should complete Question 5a using the Registro Federal de Contribuyente.

We have deleted a redundant question regarding the applicant's domicile from Section IA and Ownership and Control information from Section II. This information was used to substantiate claims that a carrier was U.S.-owned or controlled and therefore eligible to operate beyond the border zones under a Certificate of Registration. With the implementation of NAFTA's access provisions, Mexico-domiciled carriers applying to operate beyond the border zones will no longer file the OP-2 form. They must file an OP-1(MX), and ownership and control information will not be the basis for granting authority

Several safety certifications have been modified or added to Section V. The safety certification for applicants that are exempt from the Federal Motor Carrier Safety Regulations because of the weight of their vehicles and because they will not transport hazardous materials (as was discussed in the proposed form instructions but inadvertently omitted from the proposed form) has been restored. These applicants must

certify that they will observe safe operating practices and comply with applicable State, local and tribal safety laws.

Under Driver Qualifications, applicants must certify, consistent with 49 CFR 391.23, that they will investigate their drivers' 3-year employment and driving histories. The certification statement concerning the need for carriers to establish a system and instructions for drivers to report criminal convictions has been removed. Current regulations only require domestic drivers to report violations of motor vehicle traffic laws and ordinances. The certification statement relating to the use of properly licensed drivers has been modified to require that the driver's Licencia Federal de Conductor be registered in the SCT database.

The four certification statements proposed under certification section V.8, pertaining to requirements that must be in place once operations within the United States have begun, have been modified to emphasize that they are post-operational requirements and have been integrated into the Hours of Service, Driver Qualifications, and Vehicle Condition certification sections, as appropriate.

In response to comments from the ATA, Teamsters, OOIDA, and the TTD, we have extensively revised the Hazardous Materials (HM) and Cargo Tank certification statements. The HM training certification was modified to cite the relevant HM training regulations (49 CFR part 172, subpart H and 49 CFR 177.816) and the specific hazardous materials safety compliance information that must accompany the application.

We reworded the certification statement regarding the establishment of a system and procedures for

inspecting, repairing and maintaining "vehicles for HM transportation in a safe condition." The Hazardous Materials Regulations (HMR) require a system and procedures for inspection, repair and maintenance of reusable hazardous materials packages in a safe condition. The vehicle inspection, repair and maintenance requirement is covered in the Vehicle Condition certification statements.

We added a new certification statement requiring carriers to ensure that all HM vehicles are marked and placarded in compliance with 49 CFR part 172, subparts D and F.

The HM registration certification statement, which is not restricted to Cargo Tank carriers, has been corrected and moved to the Hazardous Materials section.

The Section VIII—Compliance Certification statement concerning process agent(s) has been modified to replace the phrase "judicial filings and notices" with "filings and notices." Two new Compliance Certification statements have been added. In the first, responsive to section 350(a)(5) of the DOT Appropriations Act, the applicant must certify it is willing and able to have all vehicles operated in the United States inspected at least every 90 days by a certified CVSA inspector and have decals affixed attesting to satisfactory compliance with Level I CVSA Inspection criteria. This provision will require a Mexico-domiciled motor carrier to seek out a qualified CVSA inspector to conduct a CVSA inspection at least every 90 days until it has operated under permanent authority for at least 3 consecutive years. Mexico-domiciled carriers should seek out and have Mexico-domiciled CVSA inspectors perform such inspections in Mexico before the carrier sends its vehicles to United States ports of entry. This will help

the carriers to minimize disruptions to the efficient use of their vehicles, minimize time in the U.S. ports of entry, and provide a more efficient border crossing enroute to its U.S. and Canadian destinations.

The second compliance certification added to Section VIII is designed to ensure that Mexico-domiciled carriers whose registration has been suspended or revoked are not reapplying for operating authority while under suspension or sooner than 30 days after the date of revocation, as prohibited in part 385 subpart B. A signature line also has been placed beneath the Compliance Certification statements, consistent with Section V—Safety Certifications and Section VI—Household Goods Arbitration Certifications.

Certain other changes were made to the Section VIII—Compliance Certifications after discussions with the U.S. Department of Labor and the U.S. Environmental Protection Agency. The proposed Form OP-1(MX) included a certification that the applicant is willing and able to comply with U.S. labor laws. Although the certification is included in a section that is prefaced by the direction "All applicants must certify as follows:", the instructions for the form, after first stating that FMCSA considered compliance with labor laws to be "extremely important," then indicated that "registration will not be withheld based solely on the failure by an applicant to certify that it is willing and able to comply with such [DOL and OSHA] requirements * * *." The FMCSA has removed those certification statements and the accompanying instructions. We have added new language that compliance with all pertinent Federal, State, local and tribal statutory and regulatory requirements, including labor and environmental laws, is mandatory. Such compliance

includes producing requested records for review and inspection, and that inspectors of the Immigration and Naturalization Service at the port of entry must determine the driver of the vehicle meets the requirements under the Immigration and Nationality Act. The statements do not require certification—they are informational in nature—and thus have been placed after the signature line.

The Filing Fee Policy and Computation Box that formerly appeared in the form instructions have been moved to the back of the form because a carrier cannot provide filing fee information until completing Section III—Types of Registration. The fee policy also discloses that the FMCSA will place a 30-day hold on the application if the filing fee payment is made by personal check.

Finally, FMCSA will translate the form and instructions into Spanish to help applicants understand what each question asks and what types of answers they need to provide.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and Department of Transportation Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979) because of public interest. It has been reviewed by the Office of Management and Budget under Executive Order 12866. However, it is anticipated that the

economic impact of the revisions in this rulemaking will be minimal. The new or revised Form OP-1(MX) is intended to foster and contribute to safety of operations, adherence to U.S. law and regulations, and compliance with U.S. insurance and tax payment requirements on the part of Mexico-domiciled carriers.

Nevertheless, the subject of safe operations by Mexico-domiciled carriers in the United States has generated considerable public interest within the meaning of Executive Order 12866. The manner in which the FMCSA carries out its safety oversight responsibilities with respect to this international motor carrier transportation has been of substantial interest to the domestic motor carrier industry, the Congress, and the public at large. The 2002 DOT Appropriations Act includes specific requirements FMCSA must complete to begin reviewing and processing the application Form OP-1(MX) under this interim final rule.

The Regulatory Evaluation analyzes the costs and benefits of this rule and the two companion NAFTA-related rules published elsewhere in today's Federal Register. Pursuant to Executive Order 12866, because these rules are so closely interrelated, we did not attempt to prepare separate analyses for each rule.

The evaluation estimated costs and benefits based on three different scenarios, with a high, low and medium number of Mexico-domiciled carriers assumed covered by the rules. The costs of these rules are minimal under all three scenarios. Over 10 years, the costs range from $53 million for the low scenario to approximately $76 million for the high scenario. Forty percent of these costs are borne by the FMCSA, while the remaining costs are paid by Mexico-domiciled carriers. The largest costs are those associated with conducting pre-

authorization safety audits, compliance reviews within 18-months of a carrier's receiving provisional operating authority, and the loss of a carrier's ability to operate in the United States.

The FMCSA used the cost effectiveness approach to determine the benefits of these rules. This approach involves estimating the number of crashes that would have to be deterred in order for the proposals to be cost effective. Over 10 years, the low scenario would have to deter 640 forecast crashes to be cost beneficial, the medium scenario would have to deter 838, and the high scenario would have to deter 929. While the overall number of crashes to be avoided under the medium and high scenario is fairly high, the number falls rapidly over the 10-year analysis period and beyond. The tenth year deterrence rate is one-quarter to one-sixth the size of the first year's rate.

A copy of the Regulatory Evaluation is in the docket for this rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (Pub. L. 96-354, 5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement and Fairness Act (Pub. L. 104-121), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The United States did not have in place a special system to ensure the safety of Mexico-domiciled carriers operating in the United States. Mexico-domiciled

carriers will be subject to all the same safety regulations as domestic carriers. · However, FMCSA's enforcement of the FMCSRs has become increasingly data dependent in the last several years. Several programs have been put in place to continually analyze crash rates, out-of-service rates, compliance review records, and other data sources to allow the agency to focus on high- risk carriers. This strategy is only effective if the FMCSA has adequate data on carriers' size, operations, and history. Thus, a key component of this rule and the companion application rule for border-zone carriers is the requirement that Mexico-domiciled carriers operating in the United States must complete a Form MCS-150-Motor Carrier Identification Report, and must update their Form OP-1(MX)—Application to Register Mexican Carriers for Motor Carrier Authority To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border or Form OP-2—Application for Mexican Certificate of Registration for Foreign Motor Carriers and Foreign Motor Private Carriers Under 49 U.S.C. 13902 when their situation changes. This will allow the FMCSA to better monitor these carriers and to quickly determine whether their safety or out-of- service record changes.

The more stringent oversight procedures established in our safety monitoring interim final rule, RIN 2126-AA35, will also allow the FMCSA to respond more quickly when safety problems emerge. Required safety audits, compliance reviews and CVSA inspections will provide the FMCSA with more detailed information about Mexico-domiciled carriers, and allow the FMCSA to act appropriately upon discovering safety problems.

The objective of these rules is to help ensure the safe operation of Mexico-domiciled carriers in the United

States. The rules describe what additional information Mexico-domiciled carriers will have to submit, and outline the procedure for dealing with possible safety problems.

The safety monitoring system, the safety certifications and other information to be submitted in the OP-1(MX) and OP-2 applications, and the pre-authorization safety audit are means of ensuring that: (1) Mexico-domiciled applicants are sufficiently knowledgeable about safety requirements before commencing operations (a prerequisite to being able to comply); and (2) their actual operations in the United States are conducted in accordance with their application certifications and the conditions of their registrations.

These rules will primarily affect Mexico-domiciled small motor carriers who wish to operate in the United States. The amount of information these carriers will have to supply to the FMCSA has been increased, and we estimate that they will spend two additional hours gathering data for the OP-1(MX) and OP-2 application forms. Mexico-domiciled carriers subject to this rule will also have to undergo pre-authorization safety audits and demonstrate continuous compliance with motor vehicle safety standards by undergoing compliance reviews and displaying valid CVSA inspection decals on their vehicles. We presented three growth scenarios in the regulatory evaluation: A high option, with 11,787 Mexico-domiciled carriers in the baseline; a medium scenario, with 9,500 Mexico-domiciled carriers in the baseline; and a low scenario, with 4,500 Mexico-domiciled carriers in the baseline. Under all three options, the FMCSA believes that the number of applicants will match approximately that observed in

the last few years before this publication date, approximately 1,365 applicants per year.

A review of the Motor Carrier Management Information System census file reveals that the vast majority of Mexico-domiciled carriers are small, with 75 percent having three or fewer vehicles. Carriers at the 95th percentile had only 15 trucks or buses.

These rules should not have any impact on small U.S.-based motor carriers.

The Regulatory Evaluation includes a description of the recordkeeping and reporting requirements of these rules. Applicants filing both the OP-1(MX) and OP-2 will also have to submit the Form MCS-150 and the Form BOC-3-Designation of Agent for Service of Process. In addition, Mexico-domiciled carriers will have to notify the FMCSA of any changes to certain information.

The MCS-150 is approximately two pages long. In addition to requiring basic identifying information, it requires that carriers state the type of operation they run, the number of vehicles and drivers they use, and the types of cargo they haul. The BOC-3 form merely requires the name, address and other information for a domestic agent to receive legal notices on behalf of the motor carrier. The rules also include other modest changes in the OP-1(MX) and OP-2 forms.

None of these forms require any special expertise to complete. Any individual with knowledge about the operations of a carrier should be able to fill out these forms.

The FMCSA is not aware of any other rules that duplicate, overlap with, or conflict with these rules.

The FMCSA did not establish any different requirements or timetables for small entities. As noted above, we do not believe these requirements are onerous. Most covered carriers will be required to spend two extra hours to complete the relevant forms, undergo a safety audit and a compliance review or one safety audit (depending on the type of authority they apply for) at four to six hours each and display a valid CVSA inspection decal. The part 385 rule would not achieve its purposes if small entities were exempt. In order to ensure the safety of Mexico-domiciled carriers, the rule must have a consistent procedure for addressing safety problems. Exempting small motor carriers (which, as was noted above, are the vast majority or Mexico-domiciled carriers who would operate in the United States) would defeat the purpose of these rules.

The FMCSA did not consolidate or simplify the compliance and reporting requirements for small carriers. Small U.S.-based carriers already have to comply with the paperwork requirements in part 365. There is no evidence that domestic carriers find these provisions confusing or particularly burdensome. Apropos the part 385 provisions, we believe the requirements are fairly straightforward, and it would not be possible to simplify them. A simplification of any substance would make the rule ineffectual. Given the compelling interest in guaranteeing the safety of Mexico-domiciled carriers operating in the United States, and the fact that the majority of these carriers are small entities, no special changes were made.

Therefore, the FMCSA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of $100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. The FMCSA has determined that the changes effected by this rulemaking would not have an impact of $100 million or more in any one year. The Federal Government reimburses inspectors, funds facilities, and provides support through the MCSAP grant program.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice

Reform, to minimize litigation, eliminate ambiguity and reduce burden.

Executive Order 13045 (Protection of Children)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that also concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children.

The agency has determined that this rule is not a "covered regulatory action" as defined under Executive Order 13045. First, this rule is not economically significant under Executive Order 12866 because the FMCSA has determined that the changes in this rulemaking would not have an impact of $100 million or more in any one year. The costs range from $53 to $76 million over 10 years. Second, the agency has no reason to believe that the rule would result in an environmental health risk or safety risk that would disproportionately affect children. Mexico-domiciled motor carriers who intend to operate commercial motor vehicles anywhere in the United States must comply with current U.S. Environmental Protection Agency regulations and other United States environmental laws under this rule and others being published elsewhere in today's Federal Register. Further, the agency has conducted a programmatic environmental assessment

as discussed later in this preamble. While the PEA did not specifically address environmental impacts on children, it did address whether the rule would have environmental impacts in general. Based on the PEA, the agency has determined that the proposed rule would have no significant environmental impacts.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under E. O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999 (64 FR 43255, August 10, 1999). The FMCSA has determined that this action would not have significant Federalism implications or limit the policymaking discretion of the States.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217 Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Executive Order 13166 (Limited English Proficiency)

Executive Order 13166, Improving Access to Services for Persons With Limited English Proficiency, requires each Federal agency to examine the services it

provides and develop reasonable measures to ensure that persons seeking government services but limited in their English proficiency can meaningfully access these services consistent with, and without unduly burdening, the fundamental mission of the agency. The FMCSA plans to provide a Spanish translation of the form OP-1(MX) application and instructions. We believe that this action complies with the principles enunciated in the Executive Order.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FMCSA has determined that this proposal would impact a currently approved information collection, OMB No. 2126-0016.

The information collection requirements of Form OP-1(MX) have been approved by the OMB under the control number 2126-0016, titled "Revision of Licensing Application Forms, Application Procedures, and Corresponding Regulations." This approval includes forms OP-1(MX), OP-1(P), OP-1(FF), and OP-1 and totals 40,060 burden hours. Of that amount, 2,060 annual burden hours was estimated as the OP-1(MX) baseline (1,030 respondents per year @ 2 hours each to complete the form).

Carriers anticipating that the moratorium on new grants of operating authority to Mexico-domiciled carriers would be lifted filed 190 applications, but soon ceased to file applications when it became evident that

the forms were not being processed due to a delay in implementing the NAFTA agreement. For this reason, OP-1(MX) filings fell well below the 1,000 respondent estimate.

Revisions to OP-1(MX) Baseline: A PRA review normally involves determining the information collection impacts of a rulemaking, comparing those impacts with the current regulation (baseline) and measuring the resulting change. The FMCSA finds it necessary to amend the baseline (1) to be consistent with updated demographic data on Mexico-domiciled carriers from the PEA and Regulatory Flexibility Analysis to this rule, and (2) to take into account an imminent Presidential action that is not subject to PRA review-the issuance of a Presidential Order lifting the moratorium on grants of operating authority to Mexico-domiciled motor carriers to operate within the United States beyond the border zones. The Regulatory Evaluation to this rule projects a high, medium and low estimate for the number of Mexico-domiciled carriers now operating within the United States. The PRA review is based on the medium estimate of 9,500 active carriers. Therefore, the revised baseline assumes that the moratorium is lifted and that Mexico-domiciled carriers are filing the existing OP-1(MX) application form. The agency is revising the form title to "Application to Register Mexican Carriers for Motor Carrier Authority To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border."

The FMCSA estimates that 5,108 Mexico-domiciled carriers will request OP-1(MX) operating authority in year one (includes half of the 9,500 active Mexico-domiciled carriers (4,750) plus 25 percent of 1,430 new applicants (358)), and 358 Mexico-domiciled carriers will

apply in subsequent years. The existing form takes approximately 2 hours to complete. Since Mexico-domiciled carriers currently are not required to update carrier identification information, there would be zero updates received in year one and subsequent years. The revised baseline is calculated as follows:

OP-1(MX) filings (year one): 10,216 hours [5,108 x 2 hours per form]

OP-1(MX) filings (subsequent years): 716 hours [358 x 2 hours per form]

The revised baseline results in the following annual burden hour estimate for control no. 2126- 0016:

Year One: 48,216 hours [38,000 + 10,216]

Subsequent Years: 38,358 [38,000 + 358]

Impact of the interim final rule. This action proposes to amend 49 CFR part 365 and revise Form OP-1(MX). Under the amended regulations, Mexico-domiciled motor carriers seeking to operate within the United States beyond the border zones, including carriers that previously filed pending Form OP-1(MX) applications, would be required to submit the revised Form OP-1(MX). Under the revised Form OP-1(MX), the FMCSA will collect more detailed information on an applicant motor carrier's size, operations, and history than can be collected using the current form. In addition, all grants of operating authority issued under the revised form would be conditioned upon the carrier's successful completion of a pre-operational safety audit and an 18-month safety monitoring program (established in an interim final rule published elsewhere in today's Federal Register), including a compliance review. For these reasons, the FMCSA anticipates that

the number of carriers would be lower than the revised baseline. The FMCSA estimates that 5,091 Mexico-domiciled carriers would apply for OP-1(MX) authority in year one, and 341 carriers thereafter. Due to the additional information requested on the form, the FMCSA estimates that it will take 4 hours to complete.

The FMCSA must be notified in writing of certain key changes in the information on the form within 45 days of the change. For changes and updates, the agency anticipates that annually approximately one quarter of those granted authority will update their applications. It will take approximately 30 minutes to complete the updates. For simplicity's sake, we based the number of individuals granted authority on the estimated total number of first-year applicants.

OP-1(MX) Updates/Changes:

(In year one): 1,273 = (5,091 x .25 = 1272.75 rounded)

(In subsequent years): 1,358 (5,091 + 341 = 5,432 x .25)

Therefore, the FMCSA estimates that the interim final rule will adjust the annual burden hour estimate for the OP-1(MX) as follows:

Mexico-domiciled carrier filings of the Form OP-1(MX):

(In first year): 20,364 hours [5,091 x 4 hours per form]

(In subsequent years): 1,364 hours [341 x 4 hours per form]

Updates/Changes:

(In first year): 1,273 x .50 hour per form = 637 hours (rounded)

(In subsequent years): 1,358 x .50 hour per form = 679 hours

The total burden hours for this information collection in the first year is 59,001 hours [(38,000 hours + 20,364 hours + 637 hours)] and in subsequent years is 40,043 hours [38,000 hours + 1,364 hours + 679 hours].

OMB Control Number: 2126-0016

Title: Revision of Licensing Application Forms, Application Procedures, and Corresponding Regulations.

Respondents: Mexico-domiciled motor carriers.

Estimated Annual Hour Burden for this Interim Final Rule: Year 1 = 59,001 hours; Subsequent years = 40,043 hours.

You may submit any additional comments on the information collection burden addressed by this interim final rule to the Office of Management and Budget (OMB). The OMB must receive your comments by April 18, 2002. You must mail or hand deliver your comments to: Attention: Desk Officer for the Department of Transportation, Docket Library, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, NW., Washington, DC 20503.

National Environmental Policy Act

The FMCSA is a new administration within the Department of Transportation (DOT). The FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). We expect the draft FMCSA Order to appear in the Federal Register for public comment in the near future. The framework of the FMCSA Order is consistent with and reflects the procedures for considering environmental impacts under DOT Order 5610.1C. FMCSA has analyzed this rule under the NEPA and DOT Order 5610.1C, and has issued a Finding Of No Significant Impact (FONSI). The FONSI and the environmental assessment are in the docket to this rule.

List of Subjects in 49 CFR Part 365

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the FMCSA amends 49 CFR part 365 as follows:

PART 365—RULES GOVERNING APPLICATIONS FOR OPERATING AUTHORITY

1. The authority citation for part 365 is revised to read as follows:

Authority: 5 U.S.C. 553 and 559; 16 U.S.C. 1456; 49 U.S.C. 13101, 13301, 13901-13906, 14708, 31138, and 31144; 49 CFR 1.73.

2. In § 365.101, revise paragraph (h) to read as follows:

§ 365.101 Applications governed by these rules.

* * * * *

(h) Applications for Mexico-domiciled motor carriers to operate in foreign commerce as common, contract or private motor carriers of property (including exempt items) between Mexico and all points in the United States. Under NAFTA Annex I, page I-U-20, a Mexico-domiciled motor carrier may not provide point-to-point transportation services, including express delivery services, within the United States for goods other than international cargo.

3. In § 365.105, revise paragraph (a) to read as follows:

§ 365.105 Starting the application process: Form OP-1.

(a) All applicants must file the appropriate form in the OP-1 series, effective January 1, 1995. Form OP-1 for motor property carriers and brokers of general freight and household goods; Form OP-1(P) for motor passenger carriers; Form OP-1(FF) for freight forwarders of household goods; and Form OP-1(MX) for Mexico-domiciled motor property carriers, including household goods and motor passenger carriers. A separate filing fee in the amount set forth at 49 CFR 360.3(f)(1) is required for each type of authority sought in each transportation mode.

* * * * *

4. Add a new subpart E to part 365 to read as follows:

Subpart E—Special Rules for Certain Mexico-Domiciled Carriers

Sec.

365.501 Scope of rules.

365.503 Application.

365.505 Re-registration and fee waiver for certain applicants.

365.507 FMCSA action on the application.

365.509 Requirement to notify FMCSA of change in applicant information.

365.511 Requirement for CVSA inspection of vehicles during first three consecutive years of permanent operating authority.

Appendix A to Subpart E of Part 365—Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Mexico-Domiciled Motor Carriers

Subpart E—Special Rules for Certain Mexico-domiciled Carriers

§ 365.501 Scope of rules.

(a) The rules in this subpart govern the application by a Mexico-domiciled motor carrier to provide transportation of property or passengers in interstate commerce between Mexico and points in the United States beyond the municipalities and commercial zones along the United States-Mexico international border.

(b) A Mexico-domiciled carrier may not provide point-to-point transportation services, including express delivery services, within the United States for goods other than international cargo.

§ 365.503 Application.

(a) Each applicant applying under this subpart must submit an application that consists of:

(1) Form OP-1 (MX)—Application to Register Mexican Carriers for Motor Carrier Authority To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border;

(2) Form MCS-150—Motor Carrier Identification Report; and

(3) A notification of the means used to designate process agents, either by submission in the application package of Form BOC-3—Designation of Agents-Motor Carriers, Brokers and Freight Forwarders or a letter stating that the applicant will use a process agent service that will submit the Form BOC-3 electronically.

(b) The Federal Motor Carrier Safety Administration (FMCSA) will only process your application if it meets the following conditions:

(1) The application must be completed in English;

(2) The information supplied must be accurate, complete, and include all required supporting documents and applicable certifications in accordance with the instructions to Form OP-1 (MX), Form MCS-150, and Form BOC-3;

(3) The application must include the filing fee payable to the FMCSA in the amount set forth at 49 CFR 360.3(f)(1); and

(4) The application must be signed by the applicant.

(c) You must submit the application to the address provided in Form OP-1(MX).

(d) You may obtain the application forms from any FMCSA Division Office or download it from

the FMCSA website at: http://www.fmcsa.dot.gov/factsfigs/formspubs.htm.

§ 365.505 Re-registration and fee waiver for certain applicants.

(a) If you filed an application using Form OP-1(MX) before May 3, 2002, you are required to file a new Form OP-1(MX). You do not need to submit a new fee when you file a new application under this subpart.

(b) If you hold a Certificate of Registration issued before April 18, 2002, authorizing operations beyond the municipalities along the United States-Mexico border and beyond the commercial zones of such municipalities, you are required to file an OP-1(MX) if you want to continue those operations. You do not need to submit a fee when you file an application under this subpart.

(1) You must file the application by November 4, 2003.

(2) The FMCSA may suspend or revoke the Certificate of Registration of any applicable holder that fails to comply with the procedures set forth in this section.

(3) Certificates of Registration issued before April 18, 2002, will remain valid until the FMCSA acts on the OP-1(MX) application.

§ 365.507 FMCSA action on the application.

(a) The FMCSA will review and act on each application submitted under this subpart in accordance with the procedures set out in this part.

(b) The FMCSA will validate the accuracy of information and certifications provided in the application by

checking data maintained in databases of the governments of Mexico and the United States.

(c) Pre-authorization safety audit. Every Mexico-domiciled carrier that applies under this part must satisfactorily complete an FMCSA-administered safety audit before FMCSA will grant provisional operating authority to operate in the United States. The safety audit is a review by the FMCSA of the carrier's written procedures and records to validate the accuracy of information and certifications provided in the application and determine whether the carrier has established or exercises the basic safety management controls necessary to ensure safe operations. The FMCSA will evaluate the results of the safety audit using the criteria in Appendix A to this subpart.

(d) If a carrier successfully completes the pre-authorization safety audit and the FMCSA approves its application submitted under this subpart, FMCSA will publish a summary of the application as a preliminary grant of authority in the FMCSA Register to give notice to the public in case anyone wishes to oppose the application, as required in § 365.109(b) of this part.

(e) If the FMCSA grants provisional operating authority to the applicant, it will assign a distinctive USDOT Number that identifies the motor carrier as authorized to operate beyond the municipalities in the United States on the U.S.-Mexico international border and beyond the commercial zones of such municipalities. In order to operate in the United States, a Mexico-domiciled motor carrier with provisional operating authority must:

(1) Have its surety or insurance provider file proof of financial responsibility in the form of certificates of

insurance, surety bonds, and endorsements, as required by § 387.301 of this subchapter;

(2) File a hard copy of, or have its process agent(s) electronically submit, Form BOC-3—Designation of Agents-Motor Carriers, Brokers and Freight Forwarders, as required by part 366 of this subchapter; and

(3) Comply with all provisions of the safety monitoring system in subpart B of part 385 of this subchapter, including successfully passing CVSA Level I inspections at least every 90 days and having decals affixed to each commercial motor vehicle operated in the United States as required by § 385.103(c) of this subchapter.

(f) The FMCSA may grant permanent operating authority to a Mexico-domiciled carrier no earlier than 18 months after the date that provisional operating authority is granted and only after successful completion to the satisfaction of the FMCSA of the safety monitoring system for Mexico-domiciled carriers set out in subpart B of part 385 of this subchapter. Successful completion includes obtaining a satisfactory safety rating as the result of a compliance review.

§ 365.509 Requirement to notify FMCSA of change in applicant information.

(a) A motor carrier subject to this subpart must notify the FMCSA of any changes or corrections to the information in parts I, IA or II submitted on the Form OP-1(MX) or the Form BOC-3—Designation of Agents—Motor Carriers, Brokers and Freight Forwarders during the application process or after having been granted provisional operating authority. The carrier

must notify the FMCSA in writing within 45 days of the change or correction.

(b) If a carrier fails to comply with paragraph (a) of this section, the FMCSA may suspend or revoke its operating authority until it meets those requirements.

§ 365.511 Requirement for CVSA inspection of vehicles during first three consecutive years of permanent operating authority.

A Mexico-domiciled motor carrier granted permanent operating authority must have its vehicles inspected by Commercial Vehicle Safety Alliance (CVSA)-certified inspectors every three months and display a current inspection decal attesting to the successful completion of such an inspection for at least three consecutive years after receiving permanent operating authority from the FMCSA.

Appendix A to Subpart E of Part 365—Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Mexico-Domiciled Motor Carriers

I. General

(a) Section 350 of the Fiscal Year 2002 DOT Appropriations Act (Pub. L. 107-87) directed the FMCSA to perform a safety audit of each Mexico-domiciled motor carrier before the FMCSA grants the carrier provisional operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico international border.

(b) The FMCSA will decide whether it will conduct the safety audit at the Mexico-domiciled motor carrier's principal place of business in Mexico or at a location specified by the FMCSA in the United States, in

accordance with the statutory requirements that 50 percent of all safety audits must be conducted onsite and on-site inspections cover at least 50 percent of estimated truck traffic in any year. All records and documents must be made available for examination within 48 hours after a request is made. Saturdays, Sundays, and Federal holidays are excluded from the computation of the 48-hour period.

(c) The safety audit will include:

(1) Verification of available performance data and safety management programs;

(2) Verification of a controlled substances and alcohol testing program consistent with part 40 of this title;

(3) Verification of the carrier's system of compliance with hours-of-service rules in part 395 of this subchapter, including recordkeeping and retention;

(4) Verification of proof of financial responsibility;

(5) Review of available data concerning the carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with the Federal Motor Carrier Safety Regulations, parts 382 through 399 of this subchapter, and the Federal Hazardous Material Regulations, parts 171 through 180 of this title;

(6) Inspection of available commercial motor vehicles to be used under provisional operating authority, if any of these vehicles have not received a decal required by § 385.103(d) of this subchapter;

(7) Evaluation of the carrier's safety inspection, maintenance, and repair facilities or management

systems, including verification of records of periodic vehicle inspections;

(8) Verification of drivers' qualifications, including confirmation of the validity of the Licencia de Federal de Conductor of each driver the carrier intends to assign to operate under its provisional operating authority; and

(9) An interview of carrier officials to review safety management controls and evaluate any written safety oversight policies and practices.

(d) To successfully complete the safety audit, a Mexico-domiciled motor carrier must demonstrate to the FMCSA that it has the required elements in paragraphs (c)(2), (3), (4), (7), and (8) above and other basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. The FMCSA developed a "safety audit evaluation criteria," which uses data from the safety audit and roadside inspections to determine that each applicant for provisional operating authority has basic safety management controls in place.

(e) The safety audit evaluation process developed by the FMCSA is used to:

(1) Evaluate basic safety management controls and determine if each Mexico-domiciled carrier and each driver is able to operate safely in the United States beyond municipalities and commercial zones on the United States-Mexico international border; and

(2) Identify motor carriers and drivers who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before FMCSA grants the carriers provisional operating

authority to operate beyond United States municipalities and commercial zones on the United States-Mexico international border.

II. Source of the Data for the Safety Audit Evaluation Criteria

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. The FMCSA developed this tool to assist auditors and investigators in assessing the adequacy of a Mexico-domiciled carrier's basic safety management controls.

(b) The safety audit is a review of a Mexico-domiciled motor carrier's operation and is used to:

(1) Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144;

(2) Meet the requirements of Section 350 of the DOT Appropriations Act; and

(3) In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, the safety audit can be used to educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in driver qualification files, records of duty status, vehicle maintenance records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

III. Overall Determination of the Carrier's Basic Safety Management Controls

(a) The carrier will not be granted provisional operating authority if the FMCSA fails to:

(1) Verify a controlled substances and alcohol testing program consistent with part 40 of this title;

(2) Verify a system of compliance with hours-of-service rules of this subchapter, including record-keeping and retention;

(3) Verify proof of financial responsibility;

(4) Verify records of periodic vehicle inspections; and

(5) Verify drivers' qualifications of each driver the carrier intends to assign to operate under such authority, as required by parts 383 and 391 of this subchapter, including confirming the validity of each driver's Licencia de Federal de Conductor.

(b) If the FMCSA confirms each item under II (a)(1) through (5) above, the carrier will be granted provisional operating authority, except if FMCSA finds the carrier has inadequate basic safety management controls in at least three separate factors described in part III below. If FMCSA makes such a determination, the carrier's application for provisional operating authority will be denied.

IV. Evaluation of Regulatory Compliance

(a) During the safety audit, the FMCSA gathers information by reviewing a motor carrier's compliance with "acute" and "critical" regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B, VII. List of Acute and Critical Regulations to part 385 of this subchapter.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors, evaluated on the adequacy of the carrier's safety management controls, are:

(1) Factor 1—General: Parts 387 and 390;

(2) Factor 2—Driver: Parts 382, 383 and 391;

(3) Factor 3—Operational: Parts 392 and 395;

(4) Factor 4—Vehicle: Part 393, 396 and inspection data for the last 12 months;

(5) Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and

(6) Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

(i) Vehicle Factor. (1) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

(i) If the motor carrier has had at least three roadside inspections in the twelve months before the safety audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 to determine the carrier's level of safety management control for that factor.

(ii) If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396.

(2) Over two million inspections occur on the roadside each year in the United States. This vehicle inspection information is retained in the MCMIS and is integral to evaluating motor carriers' ability to successfully maintain their vehicles, thus preventing them from being placed OOS during roadside inspections. Each safety audit will continue to have the requirements of part 396, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

(j) Accident Factor. (1) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(2) Experience has shown that urban carriers, those motor carriers operating entirely within a radius of less than 100 air miles (normally urban areas), have a higher exposure to accident situations because of their environment and normally have higher accident rates.

(3) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident

rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the United States national average accident rate in Fiscal Years 1994, 1995, and 1996.

(4) The FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable."

(k) Factor Ratings

(1) The following table shows the five regulatory factors, parts of the FMCSRs and HMRs associated with each factor, and the accident factor. Each carrier's level of basic safety management controls with each factor is determined as follows:

(i) Factor 1—General: Parts 390 and 387;

(ii) Factor 2—Driver: Parts 382, 383, and 391;

(iii) Factor 3—Operational: Parts 392 and 395;

(iv) Factor 4—Vehicle: Parts 393, 396 and the Out of Service Rate;

(v) Factor 5—Hazardous Materials: Part 171, 177, 180 and 397; and

(vi) Factor 6—Accident: Recordable Accident Rate per Million Miles;

(2) For paragraphs III (k)(1)(i) through (v) (Factors 1 through 5), if the combined violations of acute and or critical regulations for each factor is equal to three or more points, the carrier is determined not to have basic safety management controls for that individual factor.

(3) For paragraphs III (k)(1)(vi), if the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

(l) Notwithstanding FMCSA verification of the items listed in part II (a)(1) through (5) above, if the safety audit determines the carrier has inadequate basic safety management controls in at least three separate factors described in part III, the carrier's application for provisional operating authority will be denied. For example, FMCSA evaluates a carrier finding:

(1) One instance of noncompliance with a critical regulation in part 387 scoring one point for Factor 1;

(2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;

(3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and

(4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

Under this example, the carrier will not receive provisional operating authority because it scored three or more points for Factors 2, 4, and 5 and FMCSA

determined the carrier had inadequate basic safety management controls in at least three separate factors.

Issued on: March 7, 2002.

Joseph M. Clapp,

Administrator.

Note: The following form will not appear in the Code of Federal Regulations.

* * * * *

[Form OP-1(MX) and Instructions for Completing Form OP-1(MX) are omitted.]

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

[Docket No. FMCSA-98-3299]

RIN 2126-AA35

Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States

Tuesday, March 19, 2002

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), (DOT).

ACTION: Interim final rule (IFR); request for comments.

SUMMARY: The FMCSA implements a safety monitoring system and compliance initiative designed to evaluate the continuing safety fitness of all Mexico-domiciled motor carriers within 18 months after receiving a provisional Certificate of Registration or provisional authority to operate in the United States. This rule includes requirements that were not proposed in the NPRM, but which are necessary to comply with the Fiscal Year 2002 DOT Appropriations Act enacted into law in December 2001. The rule also establishes suspension and revocation procedures for provisional Certificates of Registration and operating authority and incorporates criteria to be used by FMCSA in

evaluating whether Mexico-domiciled carriers exercise basic safety management controls. Therefore, the FMCSA is publishing this action as an interim final rule and is delaying the effective date in order to consider additional public comments regarding the safety monitoring system for Mexico-domiciled carriers. The revisions in this action are part of FMCSA's efforts to ensure the safe operation of Mexico-domiciled motor carriers in the United States.

DATES: This interim final rule is effective May 3, 2002. We must receive comments by April 18, 2002.

ADDRESSES: You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001 FAX (202) 493-2251, on-line at http://dmses.dot.gov/submit. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at http://dms.dot.gov/search.htm and typing the last four digits of the docket number appearing at the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Lamm, (202) 366-9699, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., p.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

FMCSA published the notice of proposed rulemaking (NPRM) for this action on May 3, 2001 (66 FR 22415) along with two related NPRMs proposing changes to the forms and procedures for Mexico-domiciled motor carriers to apply to operate in the United States. FMCSA is publishing one interim final rule and one final rule for those two NPRMs concurrently with this action. The preambles to those rules set out the background and history of the NAFTA issues and are not repeated here.

On December 18, 2001, the President signed into law the Fiscal Year 2002 DOT Appropriations Act, Public Law 107-87 (the Act). Section 350 of the Act prohibits the expenditure of appropriated funds for reviewing or processing applications by Mexico-domiciled carriers to operate beyond the commercial zones of municipalities in the United States located on the Mexican border (Mexico-domiciled long-haul carriers) until FMCSA and DOT take several specified actions. These actions include conducting pre-authorization safety examinations on Mexico-domiciled long-haul carriers, and complying

with certain inspection, staffing, rulemaking and reporting requirements. As pertinent to this rulemaking proceeding, Section 350(a)(2) of the Act requires that FMCSA conduct a full safety compliance review on Mexico-domiciled long-haul carriers within 18 months after the carrier is granted provisional operating authority. Section 350(a)(5) requires mandatory inspection of Mexico-domiciled long-haul commercial vehicles that do not display a valid Commercial Vehicle Safety Alliance (CVSA) decal, unless the carrier has been granted permanent operating authority for three consecutive years. Accordingly, we are revising the proposed rule to implement the compliance review requirement. We are also imposing a requirement that all long-haul Mexico-domiciled carriers entering the United States display a valid CVSA sticker on their vehicles while operating under provisional status.

Summary of Parties Submitting Comments

The agency received over 200 comments. Many comments were submitted to one or all three dockets for the May 3 NPRMs. The following discussion addresses substantive comments relevant to the safety monitoring and oversight system.

The commenters may be categorized as follows:

(1) Ten United States Senators: Senators Max Baucus, Evan Bayh, Jeff Bingaman, Thomas A. Daschle, Richard J. Durbin, Tom Harkin, Edward M. Kennedy, John F. Kerry, John Kyl, and Ron Wyden, submitted one unified set of comments to the President, who forwarded their comments to the docket.

(2) More than 180 private citizens. One hundred sixteen of these citizens submitted an "Urgent Action

Alert" form letter compiled and distributed by Citizens for Reliable and Safe Highways (CRASH) or alluded to recommendations in the form letter. The CRASH suggestions are discussed later in this document. Comments were also received from 20 Tucson/Green Valley, Arizona citizens.

(3) Four Mexican associations: the Asociacion Nacional De Transporte Privado (a national private motor carrier association), Camara Nacional Del Autotransporte De Carga A.C. (CANACAR) (a national trucking association), Asociacion De Agentes Aduanales De Nuevo Laredo (a customs broker association), and Central de Servicos de Carga de Nuevo Laredo (CenSeCar) (a local trucking association of Nuevo Laredo).

(4) Four labor organizations: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Amalgamated Transit Union (ATU), the International Brotherhood of Teamsters (Teamsters), and the AFL-CIO's Transportation Trades Department representing 33 unions (TTD). The TTD submitted separate comments from the AFL-CIO, its parent organization.

(5) Four motor carrier associations: the American Bus Association (ABA), American Trucking Associations, Inc., (ATA), the California Trucking Associations (CTA), and the Owner-Operator Independent Drivers Association (OOIDA).

(6) Three Texas transportation associations: the San Antonio Free Trade Alliance, Association of Laredo Freight Forwarding Agents, and Laredo Transportation Association.

(7) Four safety advocacy groups: CRASH, Public Citizen, the American Automobile Association (AAA), and Advocates for Highway and Auto Safety (AHAS).

(8) Four environmental groups that submitted one unified response: Friends of the Earth, the Sierra Club, the Natural Resources Defense Council and the Center for International Environmental Law.

(9) Three law enforcement agencies: the California Attorney General, the California Highway Patrol, and the Arizona Department of Public Safety.

(10) Two associations representing State enforcement and licensing agencies: the Commercial Vehicle Safety Alliance (CVSA) and the American Association of Motor Vehicle Administrators (AAMVA).

(11) Three motor carriers: United Parcel Service (UPS), Greyhound Lines and Transportes Quintanilla S.A. de C.V.

(12) The Transportation Lawyers of America, Air Courier Conference of America, Transportation Consumer Protection Council, the Laredo Chamber of Commerce, the National Association of Independent Insurers (NAII), and the American Insurance Association (AIA) each submitted one comment.

Discussion of Comments to the NPRM

The municipalities adjacent to Mexico in Texas, New Mexico, Arizona, and California and the commercial zones of such municipalities will be referred to as "border zones" for the purposes of this document.

United States Senators

Senators Baucus, Bayh, Bingaman, Daschle, Durbin, Harkin, Kennedy, Kerry, Kyl and Wyden believe that the Mexican government does not have a domestic truck safety system equivalent to that provided under U.S. law. They state that Mexico does not have hours-of-service laws and has only recently proposed the use of logbooks to record driving history. Therefore, they believe that cross-border truckers could easily enter U.S. highways fatigued. They note the DOT Inspector General has stated repeatedly that "fatigue is a major factor in commercial vehicle crashes."

The Senators believe that a "lack of sufficient inspection resources at the border and the proposed 18-month delay between the approval of general cross-border trucking applications and actual safety enforcement means that trucks may easily enter the United States over federal weight and size limits, a condition both inherently more dangerous to travelers and more stressful to our roadways."

The Senators urged the President to not grant operating certificates until the administration completes onsite compliance reviews and ensures the safety of the American traveler.

CRASH "Urgent Action Alert" Form Letter and Excerpts

One hundred sixteen individuals submitted comments repeating one or more of three standard phrases suggested by CRASH's "Urgent Action Alert". These phrases are as follows:

(1) Allowing Mexican carriers to operate for up to 18 months before a safety audit is done by U.S. officials is

totally unacceptable. Safety audits must be done before Mexican carriers are allowed to enter the U.S.

(2) Application forms and processes are important and necessary but as a member of CRASH and a concerned highway safety advocate, the U.S./Mexico border should remain closed to increased NAFTA cross-border trucking until meaningful safety standards and significantly increased compliance oversight are in place on both sides of the border.

(3) Not one human life should be sacrificed on the alter [sic] of NAFTA cross-border trucking.

Individuals

Al Feuer wrote that the border should be opened to truck traffic. He also believes safety inspections/audits should not be required before allowing Mexican trucks into the United States. Mr. Feuer reasoned that advance auditing would be unfair and statistically impractical because many Mexican drivers would be unable to read road signs and markings printed in English. He believes "it would be unfair to make Mexican truck drivers meet the same safety standards as American truck drivers—who can read English." Mr. Feuer believes advance auditing would not be cost effective, but it would be more cost effective to allow Mexico-domiciled motor carriers onto our highways for 18-months and then audit the results. Mr. Feuer writes "FMCSA could easily glean accident investigation data by tapping into computers at various local and State law enforcement agencies. Then it would simply be a matter of adding the number of Americans killed and injured by unsafe Mexican truck drivers. Those who caused more deaths and injuries than United States truck drivers could be banned from United States

highways; those who caused fewer deaths and injuries than United States truck drivers could continue driving in the United States. There's your audit."

Mark Pizenche, a Land Line magazine reader, believes the requirements are good, if they can be enforced. He suggests having a sign in clear sight identifying Mexican trucks, such as a flag on a plate.

Green Valley, Arizona Residents

Elmer Silaghi, a Green Valley resident, is concerned about the safety of highway conditions along Interstate 19 near Green Valley, a retirement community located between Nogales and Tucson, Arizona. He believes that implementation of the NAFTA access provisions will exacerbate the community's existing commercial vehicle traffic congestion. The docket also received 19 comments from Tucson and Green Valley residents referring to Mr. Silaghi's letter or stating identical concerns.

Mexican Associations

Camara Nacional Del Autotransporte De Carga A.C. (CANACAR) (a Mexican Trucking Association representing the Mexican trucking industry) opposes the proposal. It believes the proposed entrance requirements are too difficult. It states that "consciously or unconsciously, all three of FMCSA's proposals unfortunately are permeated with anti-Mexican sentiments * * * disguised in the form of concern for highway safety * * * based on false assumptions." CANACAR believes Mexican trucks are safer than those operated by the U.S. trucking industry. To support this position, CANACAR stated that the out-of-service rate for U.S. and Mexican drayage companies are not very different.

Asociacion De Agentes Aduanales De Nuevo Laredo and Central de Servicos de Carga de Nuevo Laredo (CenSeCar) had similar comments. Each believes imposing inspections on short-haul carriers at the border would impact the efficient flow of traffic as well as be an unfair practice compared with the northern border. The two borders are different, they assert, and a single cookie cutter approach should not be applied. They are also concerned that all government agencies on the border are grossly understaffed. They believe that imposing unfunded mandates and new procedures without regard to staffing is categorically wrong and shortsighted.

Labor Organizations

The AFL-CIO, ATU, TTD, and the Teamsters argued that opening the border is premature because of deficiencies in Mexico's internal safety standards for motor vehicles, and that a stronger implementation plan approved by the DOT Office of Inspector General is needed. The ATU fully supports and agrees with comments submitted by the AFL-CIO. It also concurs in Greyhound's comments, with one minor exception: ATU opposes the proposal to allow up to 18 months before a safety audit is conducted on a Mexico-domiciled carrier. The common viewpoints of ATU and Greyhound are outlined as follows:

(1) Mexican buses should not be authorized to operate in the United States absent reciprocal treatment of U.S. buses by Mexico.

(2) Mexican buses must be certified as safe before the first day they are authorized to operate in the United States.

(3) FMCSA must develop and implement an effective enforcement plan before opening the border.

(4) U.S. subsidiaries of Mexican companies must be subject to the same standards and reviews as their Mexican parent companies.

(5) Application and oversight rules must be applied to small passenger carrying vehicle operations (9 to 15 passengers), as well as cross-border bus operations.

(6) Application forms must require detailed explanations of compliance measures to ensure a full understanding of the applicable laws.

Motor Carrier Associations

American Bus Association (ABA)

The American Bus Association believes there is too little inspection of buses at the border and that FMCSA should do more border inspections. It believes FMCSA should enforce compliance with the Federal Motor Vehicle Safety Standards (FMVSS) maintained and enforced by the National Highway Traffic Safety Administration.

The ABA believes a final rule imposing the Federal Motor Carrier Safety Regulations (FMCSR) on 9- to 15-passenger vans is necessary, alleging that the poor safety record of these small passenger carrying vehicle operations must be a part of FMCSA's enforcement plan.

ABA argues that the proposed safety monitoring system is inadequate to protect passengers because the rule would only apply to operators providing cross border services. It believes FMCSA should provide the same scrutiny to Mexican-owned, U.S.-domiciled car-

riers as it does to Mexican-owned, Mexico-domiciled carriers. ABA contends that these Mexican-owned companies providing domestic service in the United States will probably have a greater impact in the United States than any other type of service. ABA believes that it is critical for these operations to be included in the safety evaluation process. Although such operations are subject to the FMCSRs, they are not subject to the safety monitoring system described in this action or the two NAFTA-related rulemakings published elsewhere in today's Federal Register. ABA believes that the NAFTA Arbitral Panel provided FMCSA with the discretion to apply a heightened level of scrutiny and enforcement measures toward Mexican companies operating within the United States—regardless of whether they are based in Mexico or in the United States. According to ABA, "the rules and oversight for Mexican-owned companies providing domestic U.S. service should be at least as stringent as the rules for Mexican companies providing international service." Accordingly, ABA believes that FMCSA must expedite a rulemaking that would put into place a procedure that ensures the safety of new entrants to the U.S. market, regardless of whether they are based in the United States or Mexico, and whether or not they are Mexico-or U.S.-owned.

ABA believes that conducting an onsite review of a motorcoach company before the issuance of operating authority would be beneficial, notwithstanding the lack of complete U.S. compliance data. ABA suggests there are several items that could be checked during an initial review, including the Mexican driver's compliance with licensing and medical certification procedures. Vehicles could also be checked to ensure that they comply with

the FMVSS. ABA believes that, given the lack of safety data and history for Mexican carriers, FMCSA should consider establishing procedures that include an expeditious and comprehensive onsite review of each applicant's safety program. ABA argues that an expedited safety review procedure conducted by Federal or State enforcement personnel would do far more to ensure safety than a simple review of submitted information and the monitoring of data generated by roadside inspections that may or may not occur. ABA suggests that the educational "Safety Review" procedure established during the late 1980s could be used as a template for trucking operations, as it afforded an opportunity for motor carrier personnel to interact directly with enforcement personnel to explain regulatory requirements, and answer questions. However, ABA does not believe that this procedure will adequately ensure the safety of passengers.

ABA contends that our rulemaking will do nothing to ensure that the cross-border provisions of NAFTA are implemented in a reciprocal manner. It argues the proposed rule outlined how Mexican operators and drivers will be treated while in the United States, but gave no assurance that the Mexican government would implement identical policies. For example, ABA argues the Mexican government has taken the position that it will grant cross-border service authority for U.S. carriers to serve only one point in Mexico, and that it will not allow U.S. carriers to own or operate bus terminals in Mexico. ABA also states that the Mexican government has indicated that it will not authorize U.S. carriers to provide incidental package service as part of their cross-border trips. ABA believes that finalizing the cross-border access proposal without assurances of

reciprocal treatment of U.S. companies by Mexico would result in unequal treatment in clear violation of both the letter and spirit of NAFTA.

American Trucking Associations, Inc. (ATA)

The ATA recommended that FMCSA provide specific guidelines for establishing safety monitoring systems, including defining a "poorly performing driver". The ATA recommends that FMCSA investigate the possibility that Mexico may consider the proposed safety review program an "extraterritorial application of United States law." In light of that possibility, the ATA recommends that FMCSA work jointly with the Secretaria de Comunicacianos y Transportes (SCT) to establish a joint safety review program for Mexico-domiciled motor carriers.

Owner Operator Independent Drivers Association (OOIDA)

OOIDA believes there is a lack of Mexican infrastructure, resources, and the will to promulgate and enforce compatible safety regulations in Mexico. It contends there is no true equivalent to the 49 CFR Part 383 commercial drivers licensing regulations in Mexico.

OOIDA cites the DOT OIG report that there is a link between Mexican truck condition and the level of inspection resources. OOIDA believes FMCSA must have a minimum of 80 new safety inspectors to do border crossing inspections and 40 safety investigators to conduct compliance reviews before granting authority. OOIDA believes the FMCSA goal of more inspectors is correct, but the plans do not include enough personnel.

OOIDA believes FMCSA's proposal to review Mexico-domiciled carriers within 18 months after granting them authority is unrealistic and dangerous. It recommends that FMCSA conduct onsite reviews in Mexico and verify whether a Mexico-domiciled motor carrier has been placed out-of-service in Mexico, has had hazardous material incidents in Mexico, has a drug and alcohol testing program, and maintains valid proof of financial responsibility.

California Trucking Association (CTA)

CTA supports the rules as "well-thought [out] applications and safety entry standards for Mexico-domiciled motor carriers," but sees a need for more resources to accomplish FMCSA goals. CTA believes the safety monitoring period should be shorter than 18 months and the program should include State and local law enforcement agencies in the review teams. It recommends involving FMCSA field offices in safety reviews because it believes the field offices know their local carriers. It also recommends promulgating review standards before the initial review period. CTA predicates its support of the three NAFTA rulemakings upon four conditions, including establishing "a level playing field for all motor carriers through the application of the same laws and regulations."

Safety Advocacy Groups

The safety advocacy groups believe FMCSA should conduct a safety audit before it allows a Mexico-domiciled motor carrier to operate in the United States and that FMCSA must have more U.S. inspection sites and more safety inspectors.

American Automobile Association (AAA)

The AAA's comments are generally representative of the safety groups. The AAA believes FMCSA must:

(1) Conduct safety audits before Mexico-domiciled trucks cross the border.

(2) Follow California's incentive to Mexico-domiciled motor carriers to display a valid CVSA decal on their trucks entering the United States. If one is not apparent, FMCSA should, like California, conduct the most rigorous CVSA, or equivalent, inspection at the border.

(3) Work closely with AAMVA to see that proper licensing procedures are in place and enforceable.

(4) Weigh trucks at the border.

(5) Demand proof of financial responsibility for every vehicle in every fleet at the border. Drivers should have to carry an insurance document unique to their particular vehicle.

(6) Ensure that every one of the 27 U.S.-Mexico border crossing points has resources to monitor compliance with the FMCSRs.

Public Citizen

Public Citizen contends the proposed rule fails to acknowledge the inadequacy of the existing enforcement structure and will not protect the public from unsafe trucks crossing into the United States. It believes unsafe trucks will inevitably escape detection and travel freely throughout the United States, endangering motorists and risking a trade-related debacle.

Public Citizen contends the penalties for Mexico-domiciled carriers under the safety monitoring program would be weaker than those currently applicable to U.S.-domiciled carriers. It argues that the serious infractions listed in proposed § 385.23 would only result in a carrier receiving a safety review—a review to which it would have to submit anyway—or a deficiency letter instructing the carrier to notify FMCSA that the problem has been corrected.

Public Citizen argues that the consequences of such violations for U.S. carriers are considerably more severe, including civil and criminal fines or even jail time. It believes allowing Mexican carriers to receive weak penalties for serious violations fails to communicate the seriousness of these violations to carriers and will not prepare them to comply with these regulations at the end of the safety oversight program.

Public Citizen also believes FMCSA omitted some serious violations from the list of violations that would trigger an expedited safety review or deficiency letter. Under the proposal, an accident resulting in a hazardous materials incident prompts the expedited safety review or deficiency letter process, but an accident resulting in death, or a violation of the hours-of-service limit, does not. Public Citizen believes potential hours-of-service violations are of particular concern because Mexican carriers require their workers to drive for much longer periods than the U.S. hours-of-service limit, and Mexican laws do not include hours-of-service rules. It believes we should add hours-of-service infractions to the list in proposed § 385.23 and publish a plan for enforcing hours-of-service limits for drivers crossing the border who are not subject to any time controls while in Mexico.

Public Citizen notes the NPRM does not specify a time limit for carriers to respond to deficiency letters before their provisional registration is suspended. Public Citizen believes it is also unclear how soon an expedited safety review would take place after a serious violation is discovered and how long a carrier can be suspended without taking corrective action before its registration is revoked. It contends that without time limits, an unsafe carrier could operate indefinitely before any limitations are placed on it. It believes we must revise the NPRM to provide definite time restrictions to ensure that non-compliant carriers do not slip through the cracks.

Public Citizen also believes that FMCSA suspension or revocation of provisional registration will not change a carrier's ability to send trucks across the border. It cites a November 1999 DOT Inspector General report finding that carriers were able to retain their certificates of registration in their vehicles and continue operating across the border even after these certificates were revoked. It believes no information would be available to inspectors to verify that a certificate of registration is valid, or to verify that a driver has a certificate of registration if he or she is not able to present it upon request.

Environmental Groups

Friends of the Earth, the Natural Resources Defense Council, the Sierra Club and The Center for International Law commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children.

The Attorney General for the State of California submitted a comment in which he asserted that the FMCSA would be required to perform a "conformity determination" pursuant to the Clean Air Act (CAA), before finalizing these rulemakings. Under the CAA, Federal agencies are prohibited from supporting in any way, any activity that does not conform to an approved State Implementation Plan (SIP), (42 U.S.C. 7006). EPA regulations implementing this provision require Federal agencies to determine whether an action would conform with the SIP (a "conformity determination"), before taking the action (40 CFR 93.150). The Attorney General asserts that the FMCSA must make a conformity determination before taking final action to implement regulations that would allow Mexican trucks to operate beyond the border. The Attorney General provided technical information to support his assertion that allowing Mexican trucks to operate beyond the border would likely not be in conformity with California's SIP.

Commercial Vehicle Safety Alliance (CVSA)

CVSA believes the rules will not sufficiently reassure the public. It makes eight recommendations for strengthening the monitoring program as key to its support of this rulemaking. CVSA's recommendations include:

(1) Perform "case studies" on Mexico-domiciled motor carriers. Case studies would facilitate a collaborative safety culture and provide objective, uniform and quantitative data upon which to base policy decisions. They would be similar to the proposed safety review, except case studies would: (a) Be completed before granting operating authority; (b) be conducted

at the motor carrier's place of business; (c) include both regulatory evaluation and educational components; (d) include a representative sample of CVSA Level V inspections; and (e) adopt a collaborative approach that includes U.S., Canadian and Mexican officials. CVSA believes these case studies should initially be conducted on all carriers applying for authority to operate beyond the border zones, then on a sampling of carriers who wish to operate solely within the border zones.

(2) Require all motor carriers and drivers to renew their valid Licencia Federal de Conductor and be entered into the Mexican commercial drivers' licensing database before being granted operating authority in the United States.

(3) Work with CVSA and the States to develop the necessary legislative and policy changes for providing States the ability to enforce operating authority requirements.

(4) Investigate the equipment manufacturing standards in Mexico and report how they differ from those required in the United States, specifically with respect to compliance with the FMVSS. CVSA thinks this is particularly important to the roadside inspection program and weight enforcement.

(5) Provide clear policy direction on how to address the language issue in the field. CVSA wants us to apply a reasonable standard to determine whether a driver "can read and speak the English language sufficiently to converse with the general public, understand highway traffic signs and signals in the English language, to respond to official inquiries and to make entries on reports and records."

(6) Coordinate outreach and training programs that are delivered to Mexican motor carriers, drivers, and enforcement personnel. CVSA believes a clear and consistent message is important to the education and learning process.

(7) Make sure appropriate modifications are made to software and information systems in a timely manner and adequate time and resources are provided for training enforcement officials for all changes that are promulgated in the final rule.

(8) Explore multiple technology options (hardware, software, and communications), conduct the necessary due diligence and pilot test potential solutions for facilitating throughput at the borders and performing safety assessments on motor carriers. CVSA wants us to consider various types of incentives for safe operators and to encourage technology adoption.

American Association of Motor Vehicle Administrators (AAMVA)

AAMVA believes that Mexico-domiciled motor vehicles should be inspected for conformance to Federal motor carrier safety regulations before they are allowed to operate in the United States. Specifically, it supports periodic motor vehicle safety inspections similar to the CVSA inspections.

It also suggests conducting complete safety audits of carriers in Mexico before approving applications for operating authority. It believes a safety audit and inspection of vehicles before approval of operating authority will ensure that any vehicle entering the United States from Mexico comports with applicable safety standards and does not pose undue risk to citizens on the nation's roadways.

Transportation Consumer Protection Council

The Transportation Consumer Protection Council, representing 500 shippers and receivers of freight, believes FMCSA should require truck inspections before carriers are allowed into the United States.

National Association of Independent Insurers (NAII)

The NAII believes DOT was unable to do much to prepare for the beginning of true cross-border trucking during the previous administration. It believes that preparations must be our top priority and that we need more people and resources to handle the workload than were requested for fiscal year 2002. It believes the most pressing need to keep American roads safe when the border opens is for us to have a detailed plan showing who will do what and where.

American Insurance Association (AIA)

The AIA alleges that the proposed rules fail to provide for safety and are inconsistent with law, citing 49 U.S.C. 113(a) as providing for safety as the "highest priority." It believes follow-up inspections should be done earlier than 18 months. The AIA also believes conducting compliance reviews under § 385.13(a) that apply the criteria for evaluating safety management controls described in § 385.7 would not be sufficient. It recommends requiring safety reviews to occur on the Mexico- domiciled motor carrier's premises.

The AIA states that different procedures are expressly permissible under NAFTA and believes FMCSA could have proposed more stringent motor carrier safety procedures on Mexican carriers.

FMCSA Response to Comments

The DOT Appropriations Act

The most common recommendation made in the comments was that Mexico-domiciled carriers undergo a safety review by FMCSA before being allowed to operate in the United States. This concern was addressed in § 350(a)(1) of the DOT Appropriations Act. The FMCSA's companion rule amending our part 365 application procedures will require that Mexico-domiciled long-haul carriers receive a safety audit before receiving provisional operating authority. This pre-authorization safety audit will include verification of performance data, safety management programs (including hours-of-service compliance, vehicle inspection and maintenance and drug and alcohol testing programs) and financial responsibility. The audit will also entail vehicle inspections, verification of driver qualifications and an interview with carrier officials to review safety management controls and evaluate written safety oversight policies and practices.

FMCSA intends to provide all Mexico-domiciled carriers educational and technical assistance when they apply for provisional operating authority or a provisional Certificate of Registration. The education and technical assistance package will consist of material designed to assist the Mexico-domiciled applicant in complying with the FMCSRs and Hazardous Materials Regulations (HMRs) and establishing good safety management practices. It will include information on driver qualifications; controlled substances and alcohol use testing; commercial drivers licenses; minimum levels of financial responsibility; accident reports; requirements applicable to the driving of motor vehicles;

vehicle inspection, repair and maintenance; hours of service and records of duty status of drivers; and requirements applicable to the transportation of hazardous materials. These materials will help long-haul carriers prepare for the pre-authorization safety audit.

We are not extending the pre-authorization audit requirement to carriers seeking to operate solely within the border zones under Certificates of Registration. Border zone operations have been permitted for nearly 20 years without a pre-authorization audit requirement. The most serious safety concerns, as evidenced by the provisions of § 350 of the Act and reflected in the comments to the NPRM, involve Mexico-domiciled carriers who will be operating vehicles beyond the border zones in long-haul service. We believe that the informational and certification requirements added to the revised OP-2 form in our companion rule and the post-operational audit required by this rule will be sufficient to protect public safety in the border zones.

Section 350(a)(2) of the Act requires FMCSA to conduct a full compliance review of Mexico-domiciled long-haul carriers within 18 months after issuance of provisional operating authority. This review will be consistent with our existing safety fitness evaluation procedures set forth in subpart A of part 385 and will result in the assignment of a safety rating. As required by section 350(a)(2), the compliance review must result in a "Satisfactory" safety rating before the carrier is granted permanent operating authority to operate beyond the border zones. We have incorporated these requirements into this interim final rule. In accordance with section 350(a)(2), at least 50 percent of these compliance reviews will be conducted onsite, including

any compliance review conducted on a Mexico-domiciled carrier with four or more commercial vehicles that did not undergo an on-site safety audit before receiving provisional authority.

This rule also addresses the section 350(a)(5) requirement that any Mexico-domiciled vehicle operated in the United States beyond the border zones receive a Level 1 inspection if it does not display a valid CVSA inspection decal, unless the carrier has held permanent authority for at least three consecutive years. In order to reduce the burden on State and Federal inspection officials, at least during the 18-month provisional operating period covered by this rule, we will require all commercial vehicles operated by Mexico-domiciled long-haul carriers to display a valid CVSA inspection decal when entering the United States.

Vehicle Size and Weight Issues

In response to the Senators' concern about oversize and overweight vehicles, section 350(a)(7)(A) of the DOT Appropriations Act requires FMCSA to:

(1) Equip all United States-Mexico commercial border crossings with scales suitable for enforcement action;

(2) Equip five of the ten highest volume commercial vehicle traffic crossings with weigh-in- motion systems before reviewing or processing applications by Mexico-domiciled carriers to operate beyond the border zones;

(3) Equip the remaining five of the ten highest volume crossings with weigh- in-motion systems within 12 months; and

(4) Require inspectors to verify the weight of each Mexico-domiciled carrier's commercial vehicle entering

the United States at each weigh-in-motion equipped high volume border crossing.

The FMCSA will comply with these requirements and work with the Federal Highway Administration and States to assure the effective use of the weigh-in-motion equipment as part of an effective enforcement program. Enforcement of size and weight requirements is a State function, under the oversight of the Federal Highway Administration.

Driver Hours-of-Service

In response to the Senators' comments regarding Mexican hours-of-service laws (also discussed by Public Citizen), we note that the use of the record of duty status, commonly known as a logbook, is the tool the FMCSA uses for enforcing compliance with U.S. hours-of-service requirements. Upon entering the United States, each driver must either: (a) Have in his/her possession a record of duty status current on the day of the examination showing the total hours worked for the prior seven consecutive days, including time spent outside the United States; or, (b) demonstrate that he/she is operating as a "100 air-mile (161 air-kilometer) radius driver" under § 395.1(e).

In addition, section 350(a)(9) of the DOT Appropriations Act requires Mexico-domiciled carriers to only enter the United States at commercial border crossings: (1) Where and when a certified motor carrier safety inspector is on duty; and (2) where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of these meaningful safety inspections. The examination of drivers resulting from the section 350(a)(9) vehicle inspection

requirements would allow inspection of each Mexico-domiciled carrier's drivers upon entry and would allow certified motor carrier safety inspectors to review the driver's logbooks and discover whether hours-of-service violations have occurred.

Similarity of Regulatory Treatment

In response to the comments of the Mexican trade associations, FMCSA believes the regulatory requirements imposed in this rule are within the standards set out in the NAFTA Arbitral Panel Report, a copy of which is in the docket. The Panel noted that:

(1) The United States is not required to treat applications from Mexico-domiciled trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis; and

(2) Given the different enforcement mechanisms in place in the United States and Mexico, it may not be unreasonable for the United States to address legitimate safety concerns. Similarly, the Panel found it might be reasonable for the United States to implement different procedures with respect to service providers from another NAFTA country if necessary to ensure compliance with its own local standards by these service providers. Although CANACAR believes Mexican trucks are safer based on out-of-service rates for U.S. and Mexican drayage companies, the fact remains that Mexico's motor carrier safety regulatory system lacks several of the components that are central to the U.S. system. As the Panel found, the United States is responsible for the safe operation of motor carriers within U.S. territory, regardless of the carriers' country of origin, and FMCSA believes we must

ensure each carrier is safe to protect U.S. highway users. This rule, in conjunction with the other rules pertaining to Mexican motor carriers published elsewhere in today's Federal Register, will provide FMCSA with the necessary level of assurance, in a manner consistent with the Panel's findings, that Mexican motor carriers seeking U.S. operating authority are capable of complying with the U.S. safety regulatory regime.

ABA, AHAS, and other commenters cite language from the NAFTA Arbitral Panel's Final Report to support their comments favoring more stringent safety measures with regard to Mexico-domiciled carriers. The Panel stated, among other things, that to the extent that Mexican licensing and inspection requirements may differ from U.S. requirements, the United States might be justified in using methods to ensure Mexico-domiciled carrier compliance with the U.S. regulatory regime that differ from those used for U.S. and Canadian carriers, provided that those methods are used in good faith to address legitimate safety concerns and fully conform with all relevant NAFTA provisions. FMCSA believes that the more stringent measures in the rules published today fulfill its statutory obligation to ensure the safe operation of motor carriers in the United States in a manner that is consistent with the Panel's construction of NAFTA.

Reciprocal Treatment

ABA urged us not to publish final rules permitting Mexico-domiciled carriers to operate beyond the border zones until the government of Mexico guarantees that U.S. carriers operating in Mexico will receive the same regulatory treatment afforded to Mexican carriers

operating in that country. These regulations are intended to establish procedures to ensure that Mexico-domiciled carriers operate safely while traveling in the United States, not to police compliance with the terms of NAFTA. The NAFTA contains specific procedures designed to resolve disputes over whether the parties are fulfilling their obligations under the agreement.

Mexican-Owned, U.S.-Domiciled Motor Carriers

In response to comments by ABA, ATU, and Greyhound urging us to subject Mexican-owned, U.S.-domiciled passenger carriers to the same procedures applicable to Mexican-owned, Mexico-domiciled passenger carriers, we note that President Bush, in June 2001, issued a Memorandum that, among other things, allows a Mexican citizen to establish a U.S.-based passenger carrier to provide point-to-point transportation within the United States under the same procedures applicable to U.S.-owned, U.S.-domiciled passenger carriers. Mexican nationals may establish a passenger carrier operation in the United States by either purchasing an existing motor carrier or establishing a new motor carrier. Such carriers, as Greyhound itself points out, must use U.S. citizens or resident aliens to provide passenger service in the United States. The drivers they employ must possess a Commercial Drivers License issued in the United States. In addition, these carriers are subject to the same safety requirements, inspection procedures, enforcement mechanisms, and fines and out-of-service orders that apply to any other U.S. carrier. Thus, there is no basis to treat these carriers any differently from U.S.-owned, U.S.-domiciled carriers based solely on the owner's nationality. All U.S.-domiciled carriers, regardless of the owner's nationality, will be subject to an

interim final rule establishing application procedures and safety monitoring requirements for new entrant carriers, which we expect to publish in the near future.

Small Passenger Carrying Vehicle Operations

With respect to the small passenger carrying vehicle issues raised by the ABA, the FMCSA published a Notice of Proposed Rulemaking on January 11, 2001 (66 FR 2767) that proposed to apply most of the FMCSRs (except for CDL and drug and alcohol testing requirements) to certain passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers. The FMCSA's final small passenger carrying vehicle rule, which will be published in the near future, will address the safety issues regarding this type of operation.

Environmental Issues

Friends of the Earth, the Natural Resources Defense Council, the Sierra Club and The Center for International Law commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children from environmental health and safety risks. FMCSA is preparing an agency order to meet the requirements of DOT Order 5610.1C (that establishes the Department of Transportation's policy for compliance with NEPA by the Department's administrations). FMCSA has conducted a programmatic environmental assessment (PEA) of the three NAFTA-related rulemakings in accordance with the DOT Order and the regulations of the Council on Environmental Quality. A discussion of the PEA and its findings is presented later in the preamble under "Regulatory Analyses and

Notices." A copy of the PEA is in the docket to this rulemaking. Executive Order 13045 is addressed in the Regulatory Analyses and Notices section of this preamble.

We have reviewed our obligations under the CAA, and believe that we are in compliance with the general conformity requirements as implemented by the U.S. Environmental Protection Agency (EPA). EPA's implementing regulations exempt certain actions from the general conformity determination requirements. Actions which would result in no increase in emissions or clearly a de minimis increase, such as rulemaking (40 CFR 93.153(c)(iii)), are exempt from requiring a conformity determination. In addition, actions which do not exceed certain threshold emissions rates set forth in 40 CFR 93.153(b) are also exempt from the conformity determination requirements. The FMCSA rulemakings meet both of these exemption standards. First, as noted elsewhere in this preamble to this rule, the actions being taken by the FMCSA are rulemaking actions to improve FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border. Second, the air quality impacts from each of the FMCSA's rules neither individually nor collectively exceed the threshold emissions rates established by EPA (see Appendix C of the Environmental Assessment accompanying these rulemakings for a more detailed discussion of air quality impacts). As a result, we believe that FMCSA's rulemaking actions comply with the CAA requirements, and that no conformity determination is required.

Penalties

We believe Public Citizen did not understand the full range of penalties available to FMCSA when it made its comments that the penalties for Mexico-domiciled carriers under the safety monitoring program would be weaker than those that currently apply to U.S.-domiciled carriers. In addition to the procedures established by this rule, Mexico-domiciled carriers are fully subject to the full range of enforcement actions and sanctions faced by U.S. and Canadian carriers, including civil and criminal fines and jail time.

Expedited Action Criteria

Although violations of the hours-of-service limits are not specifically included in the list of violations prompting an expedited safety or compliance review or demand for corrective action, hours-of-service violations will be taken into account as part of a carrier's out-of-service rate, which is a triggering factor for expedited action under § 385.105(a)(7).

Although a fatal accident is not included on the list of violations that would trigger an expedited safety audit or compliance review or a demand for corrective action, Mexico-domiciled motor carriers will be subject to existing FMCSA policy regarding crashes. Under this policy, FMCSA conducts a basic Crash Inquiry on any motor carrier having a crash involving two or more fatalities, two or more injuries, or a combination of fatalities and injuries. This review policy also includes any crash that may result in the agency acquiring detailed knowledge that would be beneficial for any unusual post- crash public interest. The Crash Inquiry would include crashes involving motor coaches, unqualified drivers, explosions, and substantial fire.

FMCSA policy automatically expands the basic Crash Inquiry into a full compliance review as soon as practicable when the motor carrier is not in good standing with FMCSA. A motor carrier is not in good standing with FMCSA when it is does not have a safety rating (which would generally be the case for new entrant Mexico-domiciled carriers prior to the performance of a compliance review), the safety rating is less than satisfactory, or the carrier is on FMCSA's Safety Status Measurement System (SafeStat) with a SafeStat category of A, B, C, or D. For more information about SafeStat, see the FMCSA web page at: http://www.fmcsa.dot.gov/factsfigs/safetstat.htm.

The Mexico-domiciled motor carrier's application will create a new record attached to its new USDOT identification number without any safety rating attached to it. The lack of a safety rating for a Mexico-domiciled motor carrier coupled with a multiple fatality or injury crash will result in the Mexico-domiciled motor carrier being subject to a full compliance review as soon as practicable. This procedure is identical to the current treatment of new entrant U.S.- or Canada-domiciled motor carriers lacking a safety rating.

Procedural Time Limits

In response to Public Citizen's concern that the rule did not propose specific time limits for carriers to address identified problems and respond to letters demanding corrective action, we have added a provision that failure to respond within 30 days will result in the suspension of the carrier's provisional registration. Public Citizen also raised a question concerning the status of an uninsured carrier operating while the agency performs a safety review or processes a demand

for corrective action. FMCSA has authority, under 49 CFR 387.31(g), to deny entry to any Mexico-domiciled carrier not carrying the required evidence of financial responsibility in its vehicles. The agency also has authority, under 49 U.S.C. 14702, to obtain a court order enjoining a carrier from operating without insurance independent of the safety monitoring process. Finally, Mexico-domiciled carriers operating beyond the border zones will be required to file evidence of insurance with FMCSA as a condition for retaining their provisional operating authority. As is the case for U.S. and Canada-domiciled carriers, failure to have a current insurance filing will result in revocation of authority under existing FMCSA procedures.

Public Citizen's concerns about the timeliness of an expedited safety review are valid. The agency will strive to conduct the review as soon as possible and will give priority in assigning resources to conduct these reviews. We believe § 385.111 of the final rule adequately addresses Public Citizen's concerns about the length of time a carrier can be suspended without taking corrective action before its registration is revoked. An agency suspension of any carrier's authority to operate means the carrier cannot operate legally until it corrects its deficiencies and has received written notice from FMCSA allowing it to resume operating. The suspension order will provide for revocation of the provisional registration if necessary corrective action is not taken within 30 days.

The violations requiring expedited action are warning signs that a carrier may not have the necessary basic safety management controls in place, thus generating an immediate response in the form of a corrective action demand letter, safety audit or compliance

review. FMCSA will take these violations seriously, but they do not necessarily establish that the carrier is unfit to operate. If the carrier demonstrates that it has taken steps to correct the identified problems and that it is otherwise exercising the necessary basic safety management controls, it does not present a danger to public safety and should be allowed to continue to operate.

FMCSA is developing a database that will indicate whether a carrier has had its authority suspended or revoked. Unregistered carriers and carriers whose registration has been suspended or revoked will be denied entry into the United States. Use of this data will also help to ensure that enforcement personnel can place out-of-service at the roadside those carriers that continue to operate commercial motor vehicles within the United States after registration has been suspended or revoked.

Compliance With Federal Motor Vehicle Safety Standards (FMVSS)

FMCSA and its State partners will continue to enforce the FMVSS through roadside inspections, including inspections at the border. Roadside inspections provide a means of ensuring that vehicles meet the applicable FMVSS in effect on the date the vehicle was manufactured.

Part 393 of the FMCSRs currently includes cross-references to most of the FMVSS applicable to heavy trucks and buses. The rules require that motor carriers operating in the United States, including Mexico-domiciled carriers, must maintain the specified safety equipment and features that the National Highway Traffic Safety Administration (NHTSA) requires ve-

hicle manufacturers to install. Failure to maintain these safety devices or features is a violation of the FMCSRs. If the violations are discovered during a roadside inspection, and they are serious enough to meet the current out-of-service criteria used in roadside inspections (i.e., the condition of the vehicle is likely to cause an accident or a mechanical breakdown), the vehicle would be placed out of service until the necessary repairs are made. Any FMVSS violations that involve noncompliance with the standards presently incorporated into part 393 could subject motor carriers to a maximum civil penalty of $10,000 per violation. If FMCSA determines that Mexico-domiciled carriers are operating vehicles that do not comply with the applicable FMVSS, we could also take appropriate enforcement action for making a false certification on Form OP-1(MX) or OP-2.

To further strengthen FMVSS enforcement, FMCSA and NHTSA are initiating several regulatory actions in today's Federal Register to ensure that all commercial vehicles operated in the United States, including those operated by Mexican and Canadian carriers, display a NHTSA-required label certifying compliance with the FMVSS. FMCSA is publishing a Notice of Proposed Rulemaking proposing to incorporate the labeling requirement into part 393 and NHTSA is publishing two NPRMs and one policy statement relating to the certification label.

Many commercial motor vehicles owned by Mexican and Canadian carriers may comply with the FMVSSs in effect at the time of their manufacture. However, because these vehicles were not originally manufactured for use in the United States, they are not likely to have FMVSS certification labels. The NHTSA

policy statement permits a vehicle manufacturer to retroactively apply a label to a commercial motor vehicle certifying, if it has sufficient basis for doing so, that the vehicle complied with all applicable FMVSS in effect at the time it was originally manufactured. In connection with this policy statement, NHTSA is proposing recordkeeping requirements for foreign manufacturers that choose to retroactively certify vehicles.

In the third NHTSA document published in today's Federal Register, NHTSA is proposing to codify, in 49 CFR part 591, its longstanding interpretation of the term "import" as including bringing commercial vehicles into the United States for the purpose of transporting cargo or passengers.

Staffing Issues

Several parties expressed concern about whether there are adequate resources available to conduct the necessary inspections and safety reviews. Section 350(a)(9) of the Act prohibits Mexico-domiciled motor carriers from entering the United States at any border crossing where a certified motor carrier inspector is not on duty or where there is not adequate capacity to conduct either a sufficient number of meaningful vehicle safety inspections or accommodate vehicles placed out-of-service as a result of safety inspections. Congress has appropriated $57.8 million for FMCSA to handle its responsibilities in connection with implementing the NAFTA access provisions for Mexico-domiciled carriers. FMCSA intends to hire over 200 people for this purpose, most of whom will be conducting vehicle inspections, pre-authorization safety audits and 18-month safety audits. We believe this

significant augmentation of our existing staff at the southern border will enable us to fully comply with our safety monitoring responsibilities.

Responses to Other Comments

The individuals who submitted form comments provided by CRASH did not elaborate on what they considered to be "meaningful safety standards and significantly increased compliance oversight." We have addressed those concerns in this and the companion rulemakings published elsewhere in today's Federal Register.

We recognize the concerns of the Green Valley, Arizona residents along Interstate 19, but any increase in traffic along this route will not result from the implementation of this rule and its two companion rules. These rules do not open the border to Mexico-domiciled trucks, they impose safety certification and monitoring requirements on Mexico-domiciled motor carriers operating in the United States under the provisions of NAFTA.

In response to Mr. Pizenche's comments, 49 CFR 390.21 currently requires that all motor vehicles, including foreign vehicles, must have the carrier's name and USDOT number on each side of the power unit, and must be readable from 50 feet. In addition, our companion rule establishing application requirements for Mexico-domiciled long-haul carriers published elsewhere in today's Federal Register, requires that FMCSA issue a new USDOT identification number to each Mexico-domiciled motor carrier applicant intending to operate beyond the United States-Mexico border zones. This new USDOT identification number will have a suffix that will denote the type of authority held

by the Mexico-domiciled motor carrier and allow FMCSA to monitor the carrier's performance by inspecting crash and roadside inspection reports.

Section-by-Section Summary

We have changed the section numbers as they appeared in the NPRM. The sections are now numbered 385.101 through 385.119.

Section 385.101

This section contains the definitions of terms used in new subpart B. These include:

(1) Provisional certificate of registration, the registration issued to Mexico-domiciled border zone carriers;

(2) Provisional operating authority, the registration issued to Mexico-domiciled long-haul carriers; and

(3) Safety audit, the review conducted by FMCSA on a border zone carrier during the 18-month provisional period to determine whether the carrier exercises basic safety management controls. Because we will be conducting compliance reviews on Mexico-domiciled long-haul carriers during the 18-month provisional period, we have also added a reference to the existing definition of compliance review in § 385.3.

Section 385.103

This section describes the elements of the safety monitoring system, which include roadside monitoring, safety audits for border zone carriers and compliance reviews for long-haul carriers. FMCSA has added a requirement that all Mexico-domiciled motor vehicles operating beyond the border zones display a valid CVSA inspection decal throughout the 18-month pro-

visional operating authority period. A CVSA inspection is only valid for three months from the date of inspection. Consequently, Mexico-domiciled long-haul carriers will need to get a CVSA inspection for their vehicles every three months. FMCSA will work with CVSA to ensure that this requirement is operational when the President lifts the moratorium on granting operating authority to Mexico-domiciled motor carriers.

Section 385.105

Section 385.105(a) lists the serious violations or infractions that will result in an expedited safety audit or compliance review or, in the alternative, a demand that the carrier demonstrate in writing that it has taken immediate corrective action. The infractions listed are essentially identical to those proposed in the NPRM. We have added clarifying language regarding what constitutes a valid Licencia Federal. The type of action taken by FMCSA in response to the violations will depend upon the specific circumstances of the violations.

Sections 385.105(b) provides that failure to respond to a request for a written response demonstrating corrective action within 30 days will result in suspension of provisional registration until the required showing of corrective action is made.

Section 385.105(c) clarifies that a carrier that successfully responds to a demand for corrective action still must undergo a safety audit or compliance review during the provisional period if it has not already done so.

Section 385.107

This section describes the safety audit and what follow-up action will be taken by the agency. Safety

audits on Mexico-domiciled carriers operating only in the border zones under provisional Certificates of Registration will be conducted by an FMCSA safety specialist, usually onsite, although FMCSA reserves the right to conduct the audit at an alternate site. The safety audit will assess the adequacy of the carrier's basic safety management controls in accordance with the criteria established in new Appendix A. Appendix A does not specifically reference Mexico-domiciled motor carriers because we are considering adopting it eventually for all new entrants, except for Mexico-domiciled long-haul carriers, who must undergo compliance reviews.

The audit will consist of a review of the Mexico-domiciled carrier's safety data, a review of requested motor carrier documents, and an interview session with the Mexico-domiciled carrier by the FMCSA safety specialist. The objective of the safety audit is both to educate the carrier on compliance with the FMCSRs and HMRs and to determine areas where the carrier might be deficient in terms of compliance. Areas covered include: financial responsibility; commercial driver's license standards; qualification of drivers; controlled substances and alcohol use and testing; transporting and marking hazardous materials; requirements applicable to driving a motor vehicle; hours of service; and vehicle inspection, repair, and maintenance. A safety audit is different than a compliance review in that it focuses on providing safety management and technical assistance and is not intended to result in a safety fitness determination. However, if the audit demonstrates that the carrier fails to establish and/or exercise basic safety management controls, FMCSA will ensure that the necessary

corrective action is taken or else the carrier will not be allowed to continue operating in the United States.

FMCSA Division Administrators or State Directors will make the initial determination about the adequacy of a Mexico-domiciled carrier's basic safety management controls and whether necessary corrective action has been taken.

If the safety audit demonstrates that the carrier is exercising the necessary basic safety management controls, the carrier will retain its provisional status and will continue to be closely monitored until the expiration of the 18-month safety monitoring period. At that time, the provisional designation will be removed from its registration, provided its safety record remains in good standing.

FMCSA anticipates that the basic safety management practices of the large majority of Mexico-domiciled carriers will prove to be adequate based on the combined effect of:

(1) Providing educational material to the carrier in the application process;

(2) Requiring the carrier to certify how it will comply with the FMCSRs;

(3) Requiring long-haul carriers to successfully complete a pre-authority safety audit; and

(4) Providing notice to the carrier of what items will be covered in the safety audit or compliance review conducted during the provisional registration period.

If the safety audit reveals that the Mexico-domiciled carrier's basic safety management practices are inadequate, FMCSA will initiate a suspension and revocation proceeding. The carrier will be required to remedy the

deficiencies or else its provisional Certificate of Registration will be revoked.

Section 385.109

Section 350(a)(2) of the Act requires the compliance review of Mexico- domiciled long-haul operations to be conducted consistent with our existing safety fitness evaluation procedures in part 385 and that the carrier receive a Satisfactory safety rating before receiving permanent operating authority. Therefore, an FMCSA safety specialist will conduct compliance reviews of Mexico-domiciled long-haul carriers applying the evaluation criteria in Appendix B to part 385, the same criteria now in use for U.S and Canadian carriers. These criteria provide for the assignment of one of three proposed safety ratings upon completion of a compliance review: Satisfactory, Conditional, or Unsatisfactory.

A carrier receiving a Satisfactory rating will continue to operate under provisional status until the expiration of the 18-month safety monitoring period. At that time, the provisional designation will be removed from its registration, provided its safety record remains in good standing.

The consequences of an Unsatisfactory rating are similar to those attached to a safety audit in which it is determined that a carrier does not have adequate safety management controls. The carrier's provisional operating authority will be suspended and the FMCSA will notify the carrier that it is required to take action to improve its practices. Failure to make the necessary changes to remedy inadequate basic safety management controls will result in revocation of a carrier's provisional operating authority.

A Conditional rating is indicative of deficiencies in a carrier's safety management controls which raise concerns about its ability to operate safely but are not of sufficient magnitude to declare the carrier unfit. Because the Act requires Mexico-domiciled long-haul carriers to achieve a Satisfactory rating in order to retain their provisional operating authority, a revocation proceeding will be initiated following the assignment of a Conditional rating. However, because our existing safety rating procedures do not equate a conditional rating with unfitness and permit conditional-rated carriers to continue operating, provisional operating authority will not be suspended at the time a revocation proceeding is initiated.

Section 385.111

In response to comments, we have added procedures incorporating specific time frames for suspension and revocation of provisional operating authority and Certificates of Registration. These procedures are designed to balance the need to protect the public from potentially unsafe carriers while preserving the carrier's due process rights.

Mexico-domiciled carriers will have 10 days following notification of an Unsatisfactory rating or an unsuccessful safety audit to demonstrate that the FMCSA committed material error. If they fail to do so, the FMCSA will suspend the carrier's provisional operating authority or provisional Certificate of Registration on the 15th day, thus placing it out of service. If the carrier fails to demonstrate that it has taken necessary corrective action within 30 days from the date of suspension, FMCSA will revoke the carrier's provisional

operating authority or provisional Certificate of Registration.

Carriers assigned a Conditional rating will not have their provisional operating authority suspended, but will still need to demonstrate that necessary corrective action has been taken to prevent their authority from being revoked.

Section 385.111(e) provides for suspension of provisional registration when the carrier does not provide documents necessary for the completion of a safety audit or compliance review or does not submit sufficient evidence of corrective action in response to a written demand under § 385.105. The suspension will remain in effect until the necessary documents are produced and the carrier:

(1) Successfully completes the safety audit;

(2) Receives a Satisfactory or Conditional safety rating; or

(3) Demonstrates that it has taken the necessary corrective action in response to a § 385.105 demand. Although the assignment of a Conditional rating will be sufficient to lift the suspension, the carrier will still need to upgrade its rating to Satisfactory in order to keep its provisional operating authority.

Section 385.111(f) is intended to address the problem of recidivism, i.e., carriers who, after taking corrective action resulting in the lifting of a suspension during the provisional operating or registration period, commit one of the serious safety infractions listed in § 385.105(a). In these circumstances, the suspension will be automatically reinstated and the carrier's provisional operating authority or Certificate of Registra-

tion will be revoked unless it demonstrates it did not commit the infraction.

In a similar vein, § 385.111(g) provides for the initiation of a revocation proceeding upon receipt of credible evidence that a carrier operated in violation of a suspension order, even if that suspension order was eventually lifted. A Mexico-domiciled motor carrier that operates a commercial motor vehicle in violation of a suspension or out-of-service order will also be subject to the penalties provided in 49 U.S.C. 521(b)(2)(A), not to exceed $10,000 for each offense.

Section 385.113

Under this section, a Mexico-domiciled carrier may request FMCSA to conduct an administrative review if it believes the agency has committed an error in assigning a safety rating or determining that its basic safety management controls are inadequate. The carrier's request must explain the error it believes FMCSA committed and include a list of all factual and procedural issues in dispute. In addition, the carrier must include any information or documents that support its argument. Following the administrative review, which will be conducted by the FMCSA's Associate Administrator for Enforcement, the agency will notify the carrier of its decision, which will constitute the final action of the agency. Administrative review under this section will be completed in no more than 10 days after the request is received.

Section 385.115

This section prohibits a Mexico-domiciled carrier whose registration has been revoked from reapplying for provisional operating authority or a Certificate of

Registration for at least 30 days after the date of revocation. A Mexico- domiciled carrier reapplying for provisional registration will have to demonstrate to FMCSA's satisfaction that it has corrected the deficiencies that resulted in revocation of its registration and that it otherwise has effectively functioning basic safety management systems in place. Long-haul carriers will again be required to undergo a pre-authorization safety audit. FMCSA is obtaining information regarding revocations by inserting appropriate questions on the application forms developed in the companion rules amending parts 365 and 368 published elsewhere in today's Federal Register.

Section 385.117

This section provides that at the end of the 18-month period, the Mexico-domiciled carrier will receive permanent DOT operating authority or a Certificate of Registration if it has successfully met the requirements of the most recent safety audit or has received a Satisfactory rating, and is not currently under a notice from FMCSA to remedy its basic safety management practices. Thereafter, it will be treated like any other non-new-entrant motor carrier. If the Mexico-domiciled carrier is under a notice to remedy its basic safety management practices, its provisional designation will continue until FMCSA determines the carrier is complying with the Federal safety regulations or revokes its registration under § 385.111.

If a compliance review or safety audit has not been conducted on a Mexico-domiciled carrier within the 18-month oversight period, the provisional designation will continue until such time as FMCSA completes and evaluates a review or audit.

Compliance reviews and safety audits will normally begin within 90 to 120 days after the grant of provisional operating authority or a provisional Certificate of Registration, so that sufficient records will be available to review. FMCSA will work to ensure that all Mexico-domiciled carriers will be scheduled for an audit or compliance review within the 18-month period.

Section 385.119

This section clarifies that although FMCSA's NAFTA implementation rules will include a pre-authorization safety audit for long-haul Mexico-domiciled carriers and at least one post-operational compliance review or safety audit, this is not the exclusive safety oversight that FMCSA will apply to Mexico-domiciled carriers. FMCSA will also apply the full range of oversight and enforcement actions currently applicable to all non-new-entrant motor carriers, including civil penalties and the suspension and revocation of registration or operating authority due to persistent violations of DOT regulations governing motor carrier operations in interstate commerce.

Appendix A to Part 385

Appendix A is being added to inform Mexico-domiciled motor carriers what the evaluation criteria will be that FMCSA will use during a safety audit to rate a carrier's compliance with the FMCSRs and applicable HMRs, assess its operational safety, and assess its basic management safety management controls. The safety audit evaluation criteria are similar to the current safety rating methodology. The safety audit evaluation criteria looks at the same list of critical and acute violations as in the safety rating methodology and both use the same six factors: (1) General: Parts 387 and

390; (2) Driver: Parts 382, 383, and 391; (3) Operational: Parts 392 and 395; (4) Vehicle: Parts 393, 396, and inspection data for the last 12 months; (5) Hazardous Materials: Parts 171, 177, 180 and 397; and (6) Recordable Accident Rate per Million Miles. All Mexico-domiciled motor carriers who have a provisional Certificate of Registration will receive a safety audit. These carrier's safety audits will be subject to the safety audit evaluation criteria in Appendix A to part 385. All Mexico-domiciled motor carriers who receive a compliance review will be subject to the safety rating methodology detailed in Appendix B to part 385.

The safety audit evaluation criteria are based on 49 CFR 385.5 (Safety fitness standard) and § 385.7 (Factors to be considered in determining a safety rating). The FMCSA will use the evaluation process to ensure that Mexico-domiciled motor carriers have basic safety management controls in place. The evaluation process will also enable the FMCSA to focus its limited resources on examining the operations of carriers needing improvement in their compliance with the FMCSRs and the applicable HMRs.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979) because of public interest. It has been reviewed by the Office of Management and Budget. However, it

is anticipated that the economic impact of the revisions in this rulemaking will be minimal.

Nevertheless, the subject of safe operations by Mexico-domiciled carriers in the United States will likely generate considerable public interest within the meaning of Executive Order 12866. The manner in which FMCSA carries out its safety oversight responsibilities with respect to this cross-border motor carrier transportation may be of substantial interest to the domestic motor carrier industry, the Congress, and the public at large.

The Regulatory Evaluation analyzes the costs and benefits of this rule and the two companion NAFTA-related rules published elsewhere in today's Federal Register. Because these rules are so closely interrelated, we did not attempt to prepare separate analyses for each rule.

The evaluation estimated costs and benefits based on three different scenarios, with a high, low and medium number of Mexico-domiciled carriers assumed covered by the rules. The costs of these rules are minimal under all three scenarios. Over 10 years, the costs range from $53 million for the low scenario to approximately $76 million for the high scenario. Forty percent of these costs are borne by the FMCSA, while the remaining costs are paid by Mexico-domiciled carriers. The largest costs are those associated with conducting pre-authorization safety audits, safety audits within 18 months of a carrier's receiving provisional Certificate of Registration, compliance reviews within 18 months of a carrier's receiving provisional operating authority, and the loss of a carrier's ability to operate in the United States.

The FMCSA used the cost-effectiveness approach to determine the benefits of these rules. This approach involves estimating the number of crashes that would have to be deterred in order for the proposals to be cost effective. Over ten years, the low scenario would have to deter 640 forecast crashes to be cost beneficial, the medium scenario would have to deter 838, and the high scenario would have to deter 929. While the overall number of crashes to be avoided under the medium and high scenario is fairly high, the number falls rapidly over the 10-year analysis period and beyond. The tenth year deterrence rate is one-quarter to one-sixth the size of the first year's rate.

A copy of the Regulatory Evaluation is in the docket for this rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (Pub. L. 96-354, 5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement and Fairness Act (Pub. L. 104-121), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The United States did not have in place a special system to ensure the safety of Mexico-domiciled carriers operating in the United States. Mexico-domiciled carriers will be subject to all the same safety regulations as domestic carriers. However, FMCSA's enforcement of the FMCSRs has become increasingly data dependent in the last several years. Several programs have been put in place to continually analyze crash rates, out-of-service (OOS) rates, compliance re-

view records, and other data sources to allow the agency to focus on high-risk carriers. This strategy is only effective if FMCSA has adequate data on carriers' size, operations, and history. Thus, a key component of FMCSA's three companion NAFTA-related rules is the requirement that Mexico- domiciled carriers operating in the United States complete a Form MCS-150-Motor Carrier Identification Report, and update the information submitted in the appropriate application form (OP-1(MX) or OP-2) when key information changes. This will allow FMCSA to better monitor these carriers and to quickly determine whether their safety or OOS record changes.

The more stringent oversight procedures will also allow FMCSA to respond more quickly when safety problems emerge. The safety audits, compliance reviews and CVSA inspections will provide FMCSA with more detailed information about Mexico-domiciled carriers, and allow FMCSA to act appropriately upon discovering safety problems.

The objective of these rules is to enhance the safety of Mexico-domiciled carriers operating in the United States. The rules describe what additional information Mexico-domiciled carriers will have to submit, and outline the procedure for dealing with possible safety problems.

The safety monitoring system, combined with the safety certifications and other information to be submitted in the OP-1(MX) and OP-2 applications and the pre-authorization safety audit of Mexico-domiciled carriers seeking to operate beyond the border zones, are a means of ensuring that:

(1) Mexico-domiciled applicants are sufficiently knowledgeable about safety requirements before commencing operations (a prerequisite to being able to comply);

(2) Mexico-domiciled applicants conduct operations in the United States in accordance with their application certifications and the conditions of their registrations; and

(3) The safety performance of Mexico-domiciled applicants is at least equal to that of United States and Canadian carriers operating in the United States.

These rules will primarily affect Mexico-domiciled small motor carriers who wish to operate in the United States. The amount of information these carriers will have to supply to FMCSA has been increased, and we estimate that they will spend two additional hours gathering data for the OP-1(MX) and OP-2 application forms. Mexico-domiciled carriers will also have to undergo safety audits, an increased number of CVSA roadside inspections and compliance reviews, if they operate beyond the border zones. We presented three growth scenarios in the regulatory evaluation: a high option, with 11,787 Mexico-domiciled carriers in the baseline; a medium scenario, with 9,500 Mexico-domiciled carriers in the baseline; and a low scenario, with 4,500 Mexico-domiciled carriers in the baseline. Under all three options, the FMCSA believes that the number of applicants will match approximately that observed in the last few years before this publication date, approximately 1,365 applicants per year.

A review of the Motor Carrier Management Information System (MCMIS) census file reveals that the vast majority of Mexico-domiciled carriers are small, with 75

percent having three or fewer vehicles. Carriers at the 95th percentile carrier had only 15 trucks or buses.

These rules should not have any impact on small United States based motor carriers.

FMCSA did not establish any different requirements or timetables for small entities. As noted above, we do not believe these requirements are onerous. Most covered carriers will be required to spend two extra hours to complete the relevant forms, undergo at least one safety audit at four hours each, have their trucks inspected more frequently and, if they obtain long-haul authority, undergo a compliance review taking six hours. This part 385 interim final rule would not achieve its purposes if small entities were exempt. In order to ensure the safety of Mexico-domiciled carriers, the rule must have a consistent procedure for addressing safety problems. Exempting small motor carriers (which, as was noted above, are the vast majority or Mexico-domiciled carriers who would operate in the United States) would defeat the purpose of these rules.

FMCSA did not consolidate or simplify the compliance and reporting requirements for small carriers. Small United States carriers already have to comply with the paperwork requirements in part 365. There is no evidence that domestic carriers find these provisions confusing or particularly burdensome. Apropos the part 385 provisions, FMCSA believes the requirements are fairly straightforward, and it would not be possible to simplify them. A simplification of any substance would make the rule ineffectual. Given the compelling interest in assuring the safety of Mexico-domiciled carriers operating in the United States, and the fact

that the majority of these carriers are small entities, no special changes were made.

The part 385 requirements include performance standards. A Mexico-domiciled carrier will need to complete a safety improvement plan if its performance demonstrates that it is not operating safely, either through a high OOS rate or other problems.

Therefore, FMCSA certifies that this rule will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of $100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. FMCSA has determined that the changes proposed in this rulemaking would not have an impact of $100 million or more in any one year.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in Sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that also concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children. The agency has determined that this rule is not a "covered regulatory action" as defined under Executive Order 13045.

This rule is not economically significant under Executive Order 12866 because the FMCSA has determined that the changes in this rulemaking would not have an impact of $100 million or more in any one year. The costs range from $53 to $76 million over 10 years. This rule also does not concern an environmental health risk or safety risk that would disproportionately affect children. Mexico-domiciled motor carriers who intend to operate commercial motor vehicles anywhere in the United States must comply with current U.S. Environmental Protection Agency regulations and other United States environmental laws under this rule and others being published elsewhere in today's Federal Register. Nonetheless, the agency has conducted a programmatic environmental assessment as discussed later in this preamble.

Executive Order 12630 (Taking of Private Property)

This final rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999 (64 FR 43255, August 10, 1999). FMCSA has determined that this action would not have significant Federalism implications or limit the policymaking discretion of the States.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) [44 U.S.C. 3501-3520], Federal agencies must determine whether requirements contained in rulemakings are subject to information collection provisions of the PRA and, if they are, obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor or require through regulations. FMCSA has determined that this regulation does not constitute an information collection with the scope or meaning of the PRA.

FMCSA performs safety compliance assessments and enforcement activities as required by statutes and the FMCSRs. Implementation of this proposal would create no additional paperwork burden on Mexico-domiciled carriers that comply with the FMCSRs. Any safety data that FMCSA solicits from individual motor carriers regarding deficiency and/or non-compliance is not considered a collection of information because this type of response is required of such carriers as part of the usual and customary compliance and enforcement practice under the FMCSRs. Accordingly, FMCSA has determined that this action would not affect any requirements under the PRA.

National Environmental Policy Act

FMCSA is a new administration within the Department of Transportation (DOT). FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). FMCSA expects the draft Order to appear in the Federal Register for public comment in the near future. The framework of the FMCSA Order will be consistent with and reflect the procedures for considering environmental impacts under DOT Order 5610.1C. FMCSA has analyzed this rule under the NEPA and DOT Order 5610.1C, and has issued a Finding Of No Significant Impact (FONSI). The FONSI and the environmental assessment are in the docket to this rule.

FMCSA invites comments on the programmatic environmental assessment.

Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 49 CFR Part 385

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FMCSA amends 49 CFR part 385 as set forth below:

PART 385—SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 is revised to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5113, 13901-13905, 31136, 31144, 31148, and 31502; Section 350 of Public Law 107- 87; and 49 CFR 1.73.

2. Sections 385.1 through 385.19 are designated as Subpart A-General, and a new Subpart B is added consisting of new §§ 385.101 through 385.119 to read as follows:

Subpart B—Safety Monitoring System for Mexico-Domiciled Carriers

Sec.

385.101 Definitons.
385.103 Safety monitoring system.
385.105 Expedited action.
385.107 The safety audit.
385.109 The compliance review.
385.111 Suspension and revocation of Mexico-domiciled carrier registration.
385.113 Administrative review.
385.115 Reapplying for provisional registration.
385.117 Duration of safety monitoring system.
385.119 Applicability of safety fitness and enforcement procedures.

Subpart B—Safety Monitoring System for Mexico-Domiciled Carriers

§ 385.101 Definitions

Compliance Review means a compliance review as defined in § 385.3 of this part.

Provisional certificate of registration means the registration under § 368.6 of this subchapter that the FMCSA grants to a Mexico-domiciled motor carrier to provide interstate transportation of property within the United States solely within the municipalities along the United States-Mexico border and the commercial zones of such municipalities. It is provisional because it will

be revoked if the registrant does not demonstrate that it is exercising basic safety management controls during the safety monitoring period established in this subpart.

Provisional operating authority means the registration under § 365.507 of this subchapter that the FMCSA grants to a Mexico-domiciled motor carrier to provide interstate transportation within the United States beyond the municipalities along the United States-Mexico border and the commercial zones of such municipalities. It is provisional because it will be revoked if the registrant is not assigned a Satisfactory safety rating following a compliance review conducted during the safety monitoring period established in this subpart.

Safety audit means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRs and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

§ 385.103 Safety monitoring system.

(a) General. Each Mexico-domiciled carrier operating in the United States will be subject to an oversight program to monitor its compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs), Federal Motor Vehicle Safety Standards (FMVSSs), and Hazardous Materials Regulations (HMRs).

(b) Roadside monitoring. Each Mexico-domiciled carrier that receives provisional operating authority or a provisional Certificate of Registration will be subject

to intensified monitoring through frequent roadside inspections.

(c) CVSA decal. Each Mexico-domiciled carrier granted provisional operating authority under part 365 of this subchapter must have on every commercial motor vehicle it operates in the United States a current decal attesting to a satisfactory inspection by a Commercial Vehicle Safety Alliance (CVSA) inspector.

(d) Safety audit. The FMCSA will conduct a safety audit on a Mexico-domiciled carrier within 18 months after the FMCSA issues the carrier a provisional Certificate of Registration under part 368 of this subchapter.

(e) Compliance review. The FMCSA will conduct a compliance review on a Mexico-domiciled carrier within 18 months after the FMCSA issues the carrier provisional operating authority under part 365 of this subchapter.

§ 385.105 Expedited action.

(a) A Mexico-domiciled motor carrier committing any of the following violations identified through roadside inspections, or by any other means, may be subjected to an expedited safety audit or compliance review, or may be required to submit a written response demonstrating corrective action:

(1) Using drivers not possessing, or operating without, a valid Licencia Federal de Conductor. An invalid Licencia Federal de Conductor includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating vehicles that have been placed out of service for violations of the Commercial Vehicle Safety

Alliance (CVSA) North American Standard Out-of-Service Criteria, without making the required repairs.

(3) Involvement in, due to carrier act or omission, a hazardous materials incident within the United States involving:

(i) A highway route controlled quantity of a Class 7 (radioactive) material as defined in § 173.403 of this title;

(ii) Any quantity of a Class 1, Division 1.1, 1.2, or 1.3 explosive as defined in § 173.50 of this title; or

(iii) Any quantity of a poison inhalation hazard Zone A or B material as defined in § § 173.115, 173.132, or 173.133 of this title.

(4) Involvement in, due to carrier act or omission, two or more hazardous material incidents occurring within the United States and involving any hazardous material not listed in paragraph (a) (3) of this section and defined in chapter I of this title.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating within the United States a motor vehicle that is not insured as required by part 387 of this chapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) Failure to respond to an agency demand for a written response demonstrating corrective action within 30 days will result in the suspension of the carrier's provisional operating authority or provisional Certifi-

cate of Registration until the required showing of corrective action is submitted to the FMCSA.

(c) A satisfactory response to a written demand for corrective action does not excuse a carrier from the requirement that it undergo a safety audit or compliance review, as appropriate, during the provisional registration period.

§ 385.107 The safety audit.

(a) The criteria used in a safety audit to determine whether a Mexico-domiciled carrier exercises the necessary basic safety management controls are specified in Appendix A to this part.

(b) If the FMCSA determines, based on the safety audit, that the Mexico-domiciled carrier has adequate basic safety management controls, the FMCSA will provide the carrier written notice of this finding as soon as practicable, but not later than 45 days after the completion of the safety audit. The carrier's Certificate of Registration will remain provisional and the carrier's on-highway performance will continue to be closely monitored for the remainder of the 18-month provisional registration period.

(c) If the FMCSA determines, based on the safety audit, that the Mexico- domiciled carrier's basic safety management controls are inadequate, it will initiate a suspension and revocation proceeding in accordance with § 385.111 of this subpart.

(d) The safety audit is also used to assess the basic safety management controls of Mexico-domiciled applicants for provisional operating authority to operate beyond United States municipalities and commercial

zones on the United States-Mexico border under § 365.507 of this subchapter.

§ 385.109 The compliance review.

(a) The criteria used in a compliance review to determine whether a Mexico-domiciled carrier granted provisional operating authority under § 365.507 of this subchapter exercises the necessary basic safety management controls are specified in Appendix B to this part.

(b) Satisfactory Rating. If the FMCSA assigns a Mexico-domiciled carrier a Satisfactory rating following a compliance review conducted under this subpart, the FMCSA will provide the carrier written notice as soon as practicable, but not later than 45 days after the completion of the compliance review. The carrier's operating authority will remain in provisional status and its on-highway performance will continue to be closely monitored for the remainder of the 18-month provisional registration period.

(c) Conditional Rating. If the FMCSA assigns a Mexico-domiciled carrier a Conditional rating following a compliance review conducted under this subpart, it will initiate a revocation proceeding in accordance with § 385.111 of this subpart. The carrier's provisional operating authority will not be suspended prior to the conclusion of the revocation proceeding.

(d) Unsatisfactory Rating. If the FMCSA assigns a Mexico-domiciled carrier an Unsatisfactory rating following a compliance review conducted under this subpart, it will initiate a suspension and revocation proceeding in accordance with § 385.111 of this subpart.

§ 385.111 Suspension and revocation of Mexico-domiciled carrier registration.

(a) If a carrier is assigned an "Unsatisfactory" safety rating following a compliance review conducted under this subpart, or a safety audit conducted under this subpart determines that a carrier does not exercise the basic safety management controls necessary to ensure safe operations, the FMCSA will provide the carrier written notice, as soon as practicable, that its registration will be suspended effective 15 days from the service date of the notice unless the carrier demonstrates, within 10 days of the service date of the notice, that the compliance review or safety audit contains material error.

(b) For purposes of this section, material error is a mistake or series of mistakes that resulted in an erroneous safety rating or an erroneous determination that the carrier does not exercise the necessary basic safety management controls.

(c) If the carrier demonstrates that the compliance review or safety audit contained material error, its registration will not be suspended. If the carrier fails to show a material error in the safety audit, the FMCSA will issue an Order:

(1) Suspending the carrier's provisional operating authority or provisional Certificate of Registration and requiring it to immediately cease all further operations in the United States; and

(2) Notifying the carrier that its provisional operating authority or provisional Certificate of Registration will be revoked unless it presents evidence of necessary corrective action within 30 days from the service date of the Order.

(d) If a carrier is assigned a "Conditional" rating following a compliance review conducted under this subpart, the provisions of subparagraphs (a) through (c) of this section will apply, except that its provisional registration will not be suspended under paragraph (c)(1) of this section.

(e) If a carrier subject to this subpart fails to provide the necessary documents for a safety audit or compliance review upon reasonable request, or fails to submit evidence of the necessary corrective action as required by § 385.105 of this subpart, the FMCSA will provide the carrier with written notice, as soon as practicable, that its registration will be suspended 15 days from the service date of the notice unless it provides all necessary documents or information. This suspension will remain in effect until the necessary documents or information are produced and:

(1) A safety audit determines that the carrier exercises basic safety management controls necessary for safe operations;

(2) The carrier is rated Satisfactory or Conditional after a compliance review; or

(3) The FMCSA determines, following review of the carrier's response to a demand for corrective action under § 385.105, that the carrier has taken the necessary corrective action.

(f) If a carrier commits any of the violations specified in § 385.105(a) of this subpart after the removal of a suspension issued under this section, the suspension will be automatically reinstated. The FMCSA will issue an Order requiring the carrier to cease further operations in the United States and demonstrate, within 15 days from the service date of the Order, that it did not

commit the alleged violation(s). If the carrier fails to demonstrate that it did not commit the violation(s), the FMCSA will issue an Order revoking its provisional operating authority or provisional Certificate of Registration.

(g) If the FMCSA receives credible evidence that a carrier has operated in violation of a suspension order issued under this section, it will issue an Order requiring the carrier to show cause, within 10 days of the service date of the Order, why its provisional operating authority or provisional Certificate of Registration should not be revoked. If the carrier fails to make the necessary showing, the FMCSA will revoke its registration.

(h) If a Mexico-domiciled motor carrier operates a commercial motor vehicle in violation of a suspension or out-of-service order, it is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A), not to exceed $10,000 for each offense.

(i) Notwithstanding any provision of this subpart, a carrier subject to this subpart is also subject to the suspension and revocation provisions of 49 U.S.C. 13905 for repeated violations of DOT regulations governing its motor carrier operations.

§ 385.113 Administrative review.

(a) A Mexico-domiciled motor carrier may request the FMCSA to conduct an administrative review if it believes the FMCSA has committed an error in assigning a safety rating or suspending or revoking the carrier's provisional operating authority or provisional Certificate of Registration under this subpart.

(b) The carrier must submit its request in writing, in English, to the Associate Administrator for Enforcement, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington DC 20590.

(c) The carrier's request must explain the error it believes the FMCSA committed in assigning the safety rating or suspending or revoking the carrier's provisional operating authority or provisional Certificate of Registration and include any information or documents that support its argument.

(d) The FMCSA will complete its administrative review no later than 10 days after the carrier submits its request for review. The Associate Administrator's decision will constitute the final agency action.

§ 385.115 Reapplying for provisional registration.

(a) A Mexico-domiciled motor carrier whose provisional operating authority or provisional Certificate of Registration has been revoked may reapply under part 365 or 368 of this subchapter, as appropriate, no sooner than 30 days after the date of revocation.

(b) The Mexico-domiciled motor carrier will be required to initiate the application process from the beginning. The carrier will be required to demonstrate how it has corrected the deficiencies that resulted in revocation of its registration and how it will ensure that it will have adequate basic safety management controls. It will also have to undergo a pre-authorization safety audit if it applies for provisional operating authority under part 365 of this subchapter.

§ 385.117 Duration of safety monitoring system.

(a) Each Mexico-domiciled carrier subject to this subpart will remain in the safety monitoring system for at least 18 months from the date FMCSA issues its provisional Certificate of Registration or provisional operating authority, except as provided in paragraphs (c) and (d) of this section.

(b) If, at the end of this 18-month period, the carrier's most recent safety audit or safety rating was Satisfactory and no additional enforcement or safety improvement actions are pending under this subpart, the Mexico-domiciled carrier's provisional operating authority or provisional Certificate of Registration will become permanent.

(c) If, at the end of this 18-month period, the FMCSA has not been able to conduct a safety audit or compliance review, the carrier will remain in the safety monitoring system until a safety audit or compliance review is conducted. If the results of the safety audit or compliance review are satisfactory, the carrier's provisional operating authority or provisional Certificate of Registration will become permanent.

(d) If, at the end of this 18-month period, the carrier's provisional operating authority or provisional Certificate of Registration is suspended under § 385.111(a) of this subpart, the carrier will remain in the safety monitoring system until the FMCSA either:

(1) Determines that the carrier has taken corrective action; or

(2) Completes measures to revoke the carrier's provisional operating authority or provisional Certificate of Registration under § 385.111(c) of this subpart.

§ 385.119 Applicability of safety fitness and enforcement procedures.

At all times during which a Mexico-domiciled motor carrier is subject to the safety monitoring system in this subpart, it is also subject to the general safety fitness procedures established in subpart A of this part and to compliance and enforcement procedures applicable to all carriers regulated by the FMCSA.

3. Part 385 is amended by adding a new Appendix A to read as follows:

Appendix A to Part 385—Explanation of Safety Audit Evaluation Criteria

I. General

(a) Section 210 of the Motor Carrier Safety Improvement Act (49 U.S.C. 31144) directed the Secretary to establish a procedure whereby each owner and each operator granted new authority must undergo a safety review within 18 months after the owner or operator begins operations. The Secretary was also required to establish the elements of this safety review, including basic safety management controls. The Secretary, in turn, delegated this to the FMCSA.

(b) To meet the safety standard, a motor carrier must demonstrate to the FMCSA that it has basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. A "safety audit evaluation criteria" was developed by the FMCSA, which uses data from the safety audit and roadside inspections to determine that each owner and each operator applicant for a provisional operating authority or provisional Certificate of Registration has

basic safety management controls in place. The term "safety audit" is the equivalent to the "safety review" required by Sec. 210. Using "safety audit" avoids any possible confusion with the safety reviews previously conducted by the agency that were discontinued on September 30, 1994.

(c) The safety audit evaluation process developed by the FMCSA is used to:

1. Evaluate basic safety management controls and determine if each owner and each operator is able to operate safely in interstate commerce; and

2. Identify owners and operators who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before they are granted permanent registration.

II. Source of the Data for the Safety Audit Evaluation Criteria

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. This tool was developed to assist auditors and investigators in assessing the adequacy of a new entrant's basic safety management controls.

(b) The safety audit is a review of a Mexico-domiciled motor carrier's operation and is used to:

1. Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144;

2. Meet the requirements of Section 350 of the DOT Appropriations Act; and

3. In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, the

safety audit can be used to educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in the driver qualification files, records of duty status, vehicle maintenance records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

III. Determining if the Carrier Has Basic Safety Management Controls

(a) During the safety audit, the FMCSA gathers information by reviewing a motor carrier's compliance with "acute" and "critical" regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B, VII. List of Acute and Critical Regulations.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors, evaluated on the basis of the adequacy of the carrier's safety management controls, are:

1. Factor 1—General: Parts 387 and 390;

2. Factor 2—Driver: Parts 382, 383 and 391;

3. Factor 3—Operational: Parts 392 and 395;

4. Factor 4—Vehicle: Part 393, 396 and inspection data for the last 12 months;

5. Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and

6. Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

A. Vehicle Factor

(a) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (Part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

1. If the motor carrier has had at least three roadside inspections in the twelve months before the safety

audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 to determine the carrier's level of safety management control for that factor; and

2. If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396.

(b) Over two million inspections occur on the roadside each year. This vehicle inspection information is retained in the MCMIS and is integral to evaluating motor carriers' ability to successfully maintain their vehicles, thus preventing them from being placed OOS during roadside inspections. Each safety audit will continue to have the requirements of part 396, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

B. The Accident Factor

(a) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more

motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) Experience has shown that urban carriers, those motor carriers operating entirely within a radius of less than 100 air miles (normally urban areas), have a higher exposure to accident situations because of their environment and normally have higher accident rates.

(c) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the national average accident rate in Fiscal Years 1994, 1995, and 1996.

(d) The FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within

his/her control which would not have risked causing another kind of mishap, the accident was preventable."

C. Factor Ratings

For Factors 1 through 5, if the combined violations of acute and or critical regulations for each factor is equal to three or more points, the carrier is determined not to have basic safety management controls for that individual factor.

If the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

IV. Overall Determination of the Carrier's Basic Safety Management Controls

If the carrier is evaluated as having inadequate basic safety management controls in at least three separate factors, the carrier will be considered to have inadequate safety management controls in place and corrective action will be necessary in order to avoid having its provisional operating authority or provisional Certificate of Registration revoked.

For example, FMCSA evaluates a carrier finding:

(1) One instance of noncompliance with a critical

(2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;

(3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and

(4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

In this example, the carrier scored three or more points for Factors 2, 4, and 5 and FMCSA determined the carrier had inadequate basic safety management controls in at least three separate factors. FMCSA will require corrective action in order to avoid having the carrier's provisional operating authority or provisional Certificate of Registration suspended and possibly revoked.

Issued on: March 7, 2002.

Joseph M. Clapp,

Administrator.

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350 and 385

[Docket No. FMCSA-2001-11060]

RIN 2126-AA64

Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

Tuesday, March 19, 2002

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: The FMCSA is amending the Federal Motor Carrier Safety Regulations (FMCSRs) by designating the current safety fitness regulations and adding Certification of Safety Auditors, Safety Investigators, and Safety Inspectors regulations. Section 211 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) requires that a certified motor carrier safety auditor perform any safety audit or compliance review conducted after December 31, 2002. This rule establishes procedures to certify and maintain certification for auditors and investigators. In addition, it requires certification for State or local government Motor Carrier Safety Assistance Program (MCSAP) employees performing driver/vehicle roadside inspections.

DATES: This rule is effective June 17, 2002. We must receive your comments by May 20, 2002.

ADDRESSES: You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. The fax number is (202) 493-2251. Comments to the web site (http://dmses.dot.gov/submit) may be typed on-line. You must include the docket number that appears at the heading of this document in your comments. You may examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You may also review the docket on the Internet at http://dms.dot.gov. If you want notification of receipt of comments, please include a self-addressed, stamped envelope or postcard, or after submitting comments electronically, print the acknowledgement page.

FOR FURTHER INFORMATION CONTACT: Mr. William C. Hill, Office of Bus & Truck Standards and Operations, (202) 366-4001, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Room 8301, Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination using the docket number appearing at the top of this document in the docket room at the above address. The FMCSA will file comments received after the comment closing date in the docket and will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

Background

On December 9, 1999, the President signed the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106-159). Section 211 of the MCSIA requires the Secretary of Transportation to complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors to conduct safety inspection audits and reviews. The legislation also gives the Secretary oversight responsibility for the motor carrier auditors and investigators it certifies, including the authority to decertify them. As enacted by Section 211(a), 49 U.S.C. 31148(b) and (c) read as follows:

(b) Certified Inspection Audit Requirement.—Not later than 1 year after completion of the Rulemaking required by subsection (a), any safety inspection audit or review required by, or based on the authority of, this chapter or chapter 5, 313, or 315 of this title and performed after December 31, 2002, shall be conducted by—

(1) A motor carrier safety auditor certified under subsection (a); or

(2) A Federal or State employee who, on the date of the enactment of this section, was qualified to perform such an audit or review.

(c) Extension.—If the Secretary determines that subsection (b) cannot be implemented within the 1-year period established by that subsection and notifies the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives of the determination and the reasons therefor, the Secretary

may extend the deadline for compliance with subsection (b) by not more than 12 months.

Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

The FMCSA is implementing Section 211 by establishing three types of certification: (1) Certification to conduct safety audits, (2) certification to conduct compliance reviews, and (3) certification to conduct roadside inspections. FMCSA or State or local government MCSAP employees qualified to perform compliance reviews on December 9, 1999, are grandfathered by 49 U.S.C. 31148(b)(2) and are not required to be certified under this rule.

The FMCSA is also grandfathering Federal, or State or local MCSAP, employees who had not been hired, or had not yet completed their normal training on December 9, 1999, but were fully trained and performing compliance reviews or roadside inspections before June 17, 2002, when we are closing the grandfather period.

We believe this complies with congressional intent, since these employees received the same kind of training as those statutorily grandfathered on December 9, 1999. Moreover, requiring these employees to repeat such training would impose unnecessary costs on their agencies and burdensome time constraints on the employees themselves, keeping them from performing their important, safety-related functions.

Grandfathered employees are treated as though they had been certified through the procedures described in this rule. As such, they are also required to maintain their virtual certification by completing the required training updates.

The FMCSA is augmenting its procedures for assessing the safety performance of motor carriers by adding a new tool, a safety audit. The agency is treating the term "safety inspection audit or review "used in Section 211 as equivalent to the "safety review" of new entrants into the motor carrier industry which is mandated by Sec. 210 of the MCSIA. The two provisions are closely related. Under Section 210, the Secretary is required to "establish the elements of the safety review," which implies that it may be something less than a full compliance review pursuant to Part 385. The safety review is to be phased in "in a manner that takes into account the availability of certified motor carrier safety auditors" (49 U.S.C. 31144(c)(3), enacted by Section 210). Section 211 contemplates the use of certified auditors to perform the "safety inspection audits and reviews" that are "required by, or based on the authority of (chapter 311) or chapter 5, 313, or 315 of" title 49, United States Code. FMCSA expects that such audits will be performed by FMCSA employees or by State inspectors. The language of section 211 authorizes non-government personnel to conduct the safety review required of new entrants. FMCSA seeks comments on the advisability of certifying non-government employees that meet all training and experience criteria to conduct safety reviews as provided in the IFR. In the interest of simplicity, the FMCSA will use the single term "safety audit" in the remainder of this document, and in a subsequent rulemaking to implement Section 210.

The term "safety audit" avoids any possible confusion with the safety reviews previously conducted by the agency, which were discontinued on September 30, 1994. A safety audit will provide educational and

technical assistance to new entrant motor carriers and gather critical safety data needed to make an assessment of these carriers' safety performance and basic safety management controls. It will only be used to review carriers identified as new entrants, i.e., those registering for a USDOT identification number.

Currently, the FMCSA relies on the compliance review, an in-depth review, to assess a carrier's safety performance and compliance with the FMCSRs and applicable hazardous materials regulations (HMRs). They are typically performed only on motor carriers with poor performance, high accident rates, high vehicle or driver out-of-service rates, past poor compliance, or those against which non-frivolous complaints have been lodged. A compliance review performed on a motor carrier's operations usually results in a determination whether the carrier meets FMCSA's safety fitness standard.

Compliance reviews are performed on shippers of hazardous materials, but do not result in a safety rating, as shippers of hazardous materials are not subject to the FMCSRs.

The compliance review also provides recommendations to assist the carrier or hazardous materials shipper to attain full compliance with the regulations. Approximately 30% of compliance reviews result in enforcement actions.

The compliance review will retain its current procedures, report format, and purpose—to evaluate a motor carrier's safety fitness—and may trigger enforcement action. The FMCSA or the State MCSAP agency will certify Federal or State personnel to conduct compliance reviews and safety audits.

All individuals who conduct safety audits, compliance reviews, or driver/vehicle roadside inspections will be required to maintain their certification by performing a specific number of safety audits, compliance reviews, or inspections annually, with acceptable quality, and by successfully completing any required training. Failing to successfully complete training, or to demonstrate proficiency in conducting audits, reviews, or inspections, requires the individual to repeat the requirements established by the FMCSA for conducting safety audits, compliance reviews, or inspections.

The FMCSA is amending the MCSAP regulations to require that each State or local government participating in MCSAP certify that its employees performing safety audits, compliance reviews, and driver/vehicle roadside inspections meet minimum Federal training, experience, and proficiency standards (see 49 CFR 350.211(17)). These standards will be posted on the FMCSA website (www.fmcsa.dot.gov). This certification process is appropriate in that participating MCSAP States and local agencies already determine if their employees are qualified based on Federal standards. It also relieves them of the potential burden of requiring State or local government employees to travel out of state to be trained or to maintain their certifications to perform compliance reviews, safety audits, or roadside inspections.

The FMCSA is not including specific training requirements in this regulation. The agency needs flexibility to modify course content quickly to match changes in the FMCSRs and HMRs, or to adapt other elements of the training process to changed circumstances. Codification would make the program inflexible and difficult to manage.

The certification requirements, however, will be posted on the FMCSA website (www.fmcsa.dot.gov) and available in hard copy at its Washington, DC, headquarters. These requirements will include the successful completion of a training course covering the FMCSRs and HMRs. Certification and maintenance requirements will be updated as necessary to reflect changes in the safety regulations. The training course will thus remain current. FMCSA will work with the States and other stakeholders as we consider and develop any amendments to the training requirements.

This interim final rule is effective on June 17, 2002. Under the fiscal year 2002 DOT Appropriations Act (Public Law 107-87; December 18, 2001), Congress directed that as a precondition to processing applications of Mexico-domiciled carriers for authority to operate beyond the commercial zone, FMCSA must issue an interim final rule on this statutory requirement. This regulation only imposes a requirement to be certified as provided for in the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106-159). Certification of Federal safety investigators and State or local government employees participating in MCSAP who perform compliance reviews or driver/vehicle roadside inspections, means that these officials have successfully completed certain training programs. These training requirements have been in effect for a number of years, and the rule imposes no new burdens on such officials. The rule also creates a new kind of review—the "safety audit"—and a corresponding certification, but the training required to be certified as a safety auditor is simply a less comprehensive version of that required to conduct compliance reviews and driver/vehicle roadside inspections. Because of Con-

gress' direction and the limited impact of the regulations, FMCSA finds that there is good cause that notice and comment are contrary to the public interest under 5 U.S.C. 553(b)(3)(B).

Rulemaking Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). It has been reviewed by the Office of Management and Budget. The subject of requirements for certification of safety auditors, investigators and inspectors will likely generate considerable public interest within the meaning of Executive Order 12866. We have classified the rule as significant because of the high level of public and congressional interest in the program.

The IFR establishes the safety certification process for persons who conduct safety audits, compliance reviews, and safety inspections. This IFR will have minimal or no economic impact. The FMCSA has developed training material and requirements for the three types of certifications to ensure uniform implementation with respect to all persons who must comply with the rule. To maintain certification, individuals must conduct a minimum number of safety activities (i.e., audits, reviews, or inspections) per year. The FMCSA may develop other specific standards regarding initial certification or maintaining certification. However, Federal and State employees who currently

conduct compliance reviews and safety inspections will not have to undergo any additional training to comply with this rule. They would only be required to meet the new standards regarding maintenance of certification. States will be required to certify that their employees meet minimal Federal standards as part of their continued participation in the Motor Carrier Safety Assistance Program (MCSAP).

Currently, Federal employees who perform compliance reviews (CRs) or roadside inspections undergo an extensive training program, such as a six-week academy training class for safety investigators and a variety of refresher courses for those performing CRs. State employees who conduct these reviews or inspections under the Motor Carrier Safety Assistance Program have training requirements that are comparable to, or as effective as, the Federal program. The agency believes that the training required for initial certification of new Federal or State employees assigned to conduct safety activities will be similar to the training that these individuals currently undergo. While there may be some additional training material developed and taught due to regulatory or program changes, it is unlikely that there will be any measurable increase in the amount of time trainees must spend in class. Any extra material would most likely be offset by reduction in the amount of time spent on topics that require less classroom instruction to master the concepts. Accordingly, we do not believe that this rule will impose any new costs on Federal or State employees who undergo training. If there are costs imposed on State agencies, those expenses are eligible expenses under the MCSAP program and as such would be paid

through the program as opposed to being paid by the States.

Although the benefits of this IFR cannot be quantified at this time, we believe this rulemaking will ensure greater uniformity and consistency in the quality of safety audits, compliance reviews, and roadside inspections, than would otherwise exist. Under the IFR, Federal or State employees will have to complete a minimum number of safety activities (safety audits, compliance reviews, roadside inspections) to maintain their certifications. This should ensure consistency in the quality of the reviews and inspections, and thereby increase the likelihood that enforcement officials identify unsafe motor carriers, drivers, and vehicles during safety activities. The ultimate result should be a reduction in crashes, injuries and fatalities. (See OMCHS Safety Program Performance Measures: Assessment of Initial Models and Plans for Second Generation Models, 1999, for an analysis of the safety impact of compliance reviews. A copy of this analysis is available in the docket described above under ADDRESSES).

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the FMCSA has considered the effects of this regulatory action on small entities. This rule is directed at certifying federal and state safety auditors, investigators, and inspectors. Federal and State employees who currently conduct compliance reviews and safety inspections will not have to undergo any additional training to comply with this rule. Therefore, we have determined that there would be minimal or no economic impact on motor carriers, including small

entities. We therefore certify that it would not have a significant impact on a substantial number of small entities.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under E.O. 13045, "Protection of Children from Environmental Health Risks and Safety Risks." This rule is not economically significant and does not concern an environmental risk to health or safety that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and it has been determined that this action does not have substantial direct Federalism implications that would limit the policy-making discretion of the States. Nothing in this document directly preempts any State law or regulation. It will not impose additional costs or burdens on the States. This action will not have a significant effect

on the States' ability to execute traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FMCSA has determined that this proposal does not contain new collection of information requirements for the purpose of the PRA.

National Environmental Policy Act

The Federal Motor Carrier Safety Administration (FMCSA) is a new administration within the Department of Transportation (DOT). The FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). We expect the draft FMCSA Order to appear in the Federal Register for public comment in the near future. The framework of the FMCSA Order is consistent with and reflects the procedures for considering environmental impacts under DOT Order 5610.1C. The FMCSA analyzed this rule under the NEPA and DOT Order 5610.1C. We believe it would

be among the type of regulations that would be categorically excluded from any environmental assessment.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy because it sets standards for personnel who want to serve as safety auditors and has no direct relation to energy consumption. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

List of Subjects

49 CFR Part 350

Highway safety, Motor carriers, and Commercial Motor Carrier Safety Assistance Program.

49 CFR Part 385

Highway safety, Motor carriers, and Safety fitness procedures.

In consideration of the foregoing, Title 49, Code of Federal Regulations, Chapter III, part 350 is amended as set forth below:

1. The authority citation for Part 350 is revised to read as follows:

Authority: 49 U.S.C. 31100-31104, 31108, 31136, 31140-31141, 31144, 31148, 31161, 31310-31311, 31502; and 49 CFR 1.73.

2. Amend § 350.211 by adding (17).

§ 350.211 What is the format of the certification required by § 350.209?

* * * * *

(17) The State or a local recipient of MCSAP funds will certify that it meets the minimum Federal standards set forth in 49 CFR part 385, Subpart C, for training and experience of employees performing safety audits, compliance reviews, or driver/vehicle roadside inspections.

In consideration of the foregoing, Title 49, Code of Federal Regulations, Chapter III, part 385 is amended as set forth below:

PART 385—SAFETY FITNESS PROCEDURES

3. The authority citation for Part 385 is revised to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5113, 13901-13905, 31136, 31144, 31148, and 31502; Section 350 of Public Law 107- 87; and 49 CFR 1.73.

4. Amend paragraph 2 in the definition of Reviews in § 385.3 to read as follows:

§ 385.3 Definitions.

Reviews. For the purposes of this part:

* * * * *

(2) Safety Audit means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRs and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

6. Part 385 is amended by adding a new Subpart C to read as follows:

Subpart C—Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

Sec.

385.201 Who is qualified to perform a review of a motor carrier?

385.203 What are the requirements to obtain and maintain certification?

385.205 How can a person who has lost his or her certification be re-certified?

§ 385.201 Who is qualified to perform a review of a motor carrier?

(a) An FMCSA employee, or a State or local government employee funded through MCSAP, who was qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit or roadside inspection if he or she complies with § 385.203(b).

(b) A person who was not qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit or roadside inspection after complying with the requirements of § 385.203(a).

§ 385.203 What are the requirements to obtain and maintain certification?

(a) After June 17, 2002, a person who is not qualified under § 385.201(a) may not perform a compliance review, safety audit, or roadside inspection unless he or she has been certified by FMCSA or a State or local agency applying the FMCSA standards after successfully completing classroom training and examinations on the FMCSRs and HMRs as described in detail on the FMCSA website (www.fmcsa.dot.gov). These employees must also comply with the maintenance of certification/qualification requirements of paragraph (b) of this section.

(b) Maintenance of certification/qualification. A person may not perform a compliance review, safety audit, or roadside inspection unless he or she meets the quality-control and periodic re-training requirements adopted by the FMCSA to ensure the maintenance of high standards and familiarity with amendments to the FMCSRs and HMRs. These maintenance of certification/qualification requirements are described in detail on the FMCSA website (www.fmcsa.dot.gov).

(c) The requirements of paragraphs (a) and (b) of this section for training, performance and maintenance of certification/qualification, which are described on the FMCSA website (www.fmcsa.dot.gov), are also available in hard copy from the Office of Professional Development and Training, FMCSA, 400 7th Street, SW., Washington, DC 20590.

§ 385.205 How can a person who has lost his or her certification be re-certified?

He or she must successfully complete the requirements of § 385.203(a) and (b).

Issued on: March 7, 2002.

Joseph M. Clapp,

Administrator.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 02-70986, 02-71249

PUBLIC CITIZEN, ET AL., PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL, ET AL., PETITIONERS-INTERVENORS

v.

DEPARTMENT OF TRANSPORTATION, ET AL., RESPONDENTS

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL, ET AL., PETITIONERS-INTERVENORS

v.

U.S. DEPARTMENT OF TRANSPORTATION, ET AL., RESPONDENTS

[Filed: Apr. 10, 2003]

ORDER

Before: D.W. NELSON, HAWKINS and W ARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing. Judges Hawkins and Wardlaw

have noted to deny the petition for en banc rehearing, and Judge Nelson has so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and for rehearing en banc are DENIED.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

1. Administrative Procedure Act

Section 706 of Title 5 of the United States Code provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, orotherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. National Environmental Policy Act

a. Section 4332 of Title 42 of the United States Code provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]

b. Section 1508.7 of Title 40 of the Code of Federal Regulations provides:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such

other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

c. Section 1508.8 of Title 40 of the Code of Federal Regulations provides:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

d. Section 1508.12 of Title 40 of the Code of Federal Regulations provides:

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office.

It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

e. Section 1508.25 of Title 40 of the Code of Federal Regulations provides:

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions,

have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

3. Clean Air Act

a. Section 7506(c)(1) of Title 42 of the United States Code provides:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or

instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

b. Section 93.150 of Title 40 of the Code of Federal Regulations provides:

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable imple-

mentation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to January 31, 1994, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

c. Section 93.152 of Title 40 of the Code of Federal Regulations provides in pertinent part:

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

* * * * *

Indirect emissions means those emissions of a criteria pollutant or its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

APPENDIX E

Memorandum

Determination Under the Interstate Commerce Commission Termination Act of 1995

November 27, 2002

Memorandum for the Secretary of Transportation

Section 6 of the Bus Regulatory Reform Act of 1982, Public Law 97-261, 96 Stat. 1103, imposed a moratorium on the issuance of certificates or permits to motor carriers domiciled in, or owned or controlled by persons of, a contiguous foreign country and authorized the President to modify the moratorium. The Interstate Commerce Commission Termination Act of 1995 (ICCTA), Public Law 104-88, 109 Stat. 803, maintained these restrictions, subject to modifications made prior to the enactment of the ICCTA, and empowered the President to make further modifications to the moratorium.

Pursuant to 49 U.S.C. 13902(c)(3), I modified the moratorium on June 5, 2001, to allow motor carriers domiciled in the United States that are owned or controlled by persons of Mexico to obtain operating authority to transport international cargo by truck between points in the United States and to provide bus services between points in the United States.

The North American Free Trade Agreement (NAFTA) established a schedule for liberalizing certain restrictions on the provision of bus and truck services

by Mexican-domiciled motor carriers in the United States. Pursuant to 49 U.S.C. 13902(c)(3), I hereby determine that the following modifications to the moratorium are consistent with obligations of the United States under NAFTA and with our national transportation policy and that the moratorium shall be modified accordingly.

First, qualified motor carriers domiciled in Mexico will be allowed to obtain operating authority to transport passengers in cross-border scheduled bus services. Second, qualified motor carriers domiciled in Mexico will be allowed to obtain operating authority to provide cross-border truck services. The moratorium on the issuance of certificates or permits to Mexican-domiciled motor carriers for the provision of truck or bus services between points in the United States will remain in place. These modifications shall be effective on the date of this memorandum.

Furthermore, pursuant to 49 U.S.C. 13902(c)(5), I hereby determine that expeditious action is required to implement this modification to the moratorium. Effective on the date of this memorandum, the Department of Transportation is authorized to act on applications, submitted by motor carriers domiciled in Mexico, to obtain operating authority to provide cross-border scheduled bus services and cross-border truck services. In reviewing such applications, the Department shall continue to work closely with the Department of Justice, the Office of Homeland Security, and other relevant Federal departments, agencies, and offices in order to help ensure the security of the border and to prevent potential threats to national security.

Motor carriers domiciled in Mexico operating in the United States will be subject to the same Federal and

State laws, regulations, and procedures that apply to carriers domiciled in the United States. These include safety regulations, such as drug and alcohol testing requirements; insurance requirements; taxes and fees; and other applicable laws and regulations, including those administered by the United States Customs Service, the Immigration and Naturalization Service, the Department of Labor, and Federal and State environmental agencies.

You are authorized and directed to publish this memorandum in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

Washington, November 27, 2002.

No. 03-358

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Supreme Court of the United States

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Petitioners,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether administrative rules of a federal agency that will permit the operation of Mexico-domiciled trucks throughout the United States are subject to the requirement that the agency prepare an Environmental Impact Statement that discloses and evaluates the rules' serious environmental effects under the National Environmental Policy Act, 42 U.S.C. §4332.

2. Whether those same rules require a conformity analysis with state plans under the Clean Air Act, 42 U.S.C. §7506.

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RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL PROVISIONS INVOLVED

In addition to the statutes and regulations in petitioners' appendix, respondents' appendix includes other relevant provisions: Chapter 9, Article 904(1) of the North American Free Trade Agreement ("NAFTA"); 19 U.S.C. §3312(a)(1), a portion of the NAFTA Implementation Act; §350(a) of the 2002 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 107-87, 115 Stat. 864-66; and a portion of 40 C.F.R. §93.152.

STATEMENT

Petitioners request that this Court review a narrow decision interpreting the applicability of domestic environmental laws to a federal agency's rulemaking. Petitioners seek review to set aside a purported constraint on the President's discretion over foreign affairs, an issue that was not raised below and that is not implicated in this case. This case does not involve the application of environmental laws to a presidential decision, nor does it challenge the President's ability to conduct foreign policy or the validity of NAFTA. Rather, as the court of appeals explained, the issue in this case "is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by [the agency] before promulgating the three regulations" at issue. App. 26a. The court "emphasize[d] that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us." App. 51a.

1. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321-70(f), and the Clean Air Act ("CAA"), 42 U.S.C. §§7401-671(q), have long contained environmental requirements that federal agencies must meet. *See generally* App. 3a-7a.

NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" with respect to "the environmental impact of the proposed action, . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. §4332. Moreover, "to the fullest extent possible . . . policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA. 42 U.S.C. §4332.

The CAA requires each state to develop an implementation plan to comply with federal air quality standards. 42 U.S.C. §7410(a). While imposing this requirement on the states, Congress also ensured that the federal government would not do anything to impede compliance with state plans: "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan." 42 U.S.C. §7506(c)(1). Each agency head is responsible for making a determination of conformity. 42 U.S.C. §7506(c)(1).

These NEPA and CAA provisions do not distinguish between duties of an environmental agency and those of other agencies. Nor do these statutes (or the Administrative Procedure Act, 80 Stat. 392, codified as amended, 5 U.S.C. §§551-59, 701-06, which permits judicial review of agency action) excuse agencies from compliance when the President takes a separate action that may also affect the environment.

2. The ratification of NAFTA did nothing to change NEPA or the CAA: *See generally* App. 7a-8a. NAFTA was meant not only to increase trade, but also to "STRENGTHEN the development and enforcement of environmental laws and regulations." NAFTA pmbl., 32 I.L.M. 289, 297 (1993) (capitalization in original). Signatories to NAFTA may "adopt, maintain or apply any standards-related measure, including any such measure relating to . . . protection of human . . . life or health, [or] the environment." NAFTA, Ch. 9, Art. 904(1), 32 I.L.M. at 387. Similarly, when Congress approved NAFTA through the NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2037, 19 U.S.C. §§3301-473, Congress provided: "No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have any effect." 19 U.S.C. §3312(a)(1).

Accordingly, NEPA and the CAA continue to constrain the actions of federal agencies just as those laws did before NAFTA.

3. For years before and after ratification of NAFTA, Congress and the President maintained a moratorium on the operation of Mexico-domiciled motor carriers within the United States, restricting operations to a narrow commercial zone along the border. *See* App. 9a-10a. After ratification of NAFTA, Congress continued the existing moratorium, and authorized the President to modify or lift it upon making certain determinations. *See* 49 U.S.C. §13902(c). This litigation does not challenge the President's authority to modify or lift the moratorium—or any other presidential authority.

In February 2001, an arbitration panel established pursuant to NAFTA ruled that the refusal of the United States to consider applications of Mexico-domiciled trucks to travel beyond border commercial zones *due to safety concerns* violated NAFTA. *See* App. 10a; C.A. ER 312-13, SER 23. The arbitration panel did not determine whether a delay in considering such applications as a result of compliance with domestic environmentai laws would violate NAFTA. Petitioners do not assert that the panel considered environmental issues at all, and, indeed, the panel did not—nor could it—bar the United States from enforcing NEPA and the CAA, which NAFTA does not override.

4. Respondents agree with petitioners that "[a]lmost immediately after the arbitrators' decision, the President made clear his intention to lift the moratorium on cross-border operations." Pet. for Cert. at 5. The administration stated that it would permit Mexico-domiciled trucks to travel beyond the commercial zones by January 2002. C.A. ER 313. Meanwhile, the Federal Motor Carrier Safety Administration ("FMCSA"), a federal agency within the Department of Transportation ("DOT"), began the process of

preparing rules governing both applications for admission of Mexico-domiciled trucks to the United States and the safety of those trucks. The agency published proposed rules for comment in May 2001. *See* App. 10a.

Congress intervened before the rules became final and prior to any agency consideration of applications by Mexico-domiciled carriers to operate within the United States. On December 18, 2001, the President signed into law the fiscal year 2002 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 107-87, 115 Stat. 833. Section 350 of that Act provides in part: "No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border until the Federal Motor Carrier Safety Administration" puts into place certain safety and inspection standards for Mexico-domiciled trucks seeking to operate beyond the commercial zones. Pub. L. 107-87, §350(a). The preconditions included that the previously published application and safety rules contain additional requirements, *see* App. 62a, 128a, and that a different rule concerning certification be promulgated, *see* App. 210a.

The conditions in the 2002 DOT Appropriations Act—which were enacted *after* Congress gave the President the authority to lift the moratorium—were independent of any presidential action, and were to remain in place regardless of whether the President lifted the moratorium. Because NAFTA did not change NEPA or the CAA, those statutes applied to FMCSA as it endeavored to promulgate rules complying with the conditions of the new legislation.

In sum, as of mid-December 2001, two key, *independent* barriers prevented Mexico-domiciled trucks from operating throughout the United States: (i) the restrictions Congress imposed in the 2002 DOT Appropriations Act, which

prohibited use of funds to process applications from Mexico-domiciled trucks until the rules at issue in this case are properly promulgated and implemented; and (ii) the moratorium on cross-border trucking maintained by the President as authorized by Congress (which the President had already announced he would lift).

In March 2002, FMCSA issued three sets of Interim Final Rules intended to meet the congressional preconditions for permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States. *See* App. 53a-220a. FMCSA promulgated each of the three rules in order to comply with the 2002 DOT Appropriations Act. App. 53a-54a, 125a, 210a.

5. FMCSA did not prepare an Environmental Impact Statement ("EIS") for any of the three rules as required by NEPA when a federal agency takes major action "significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Instead, for the two rules that it had originally published in May 2001 and then modified to comply with the 2002 DOT Appropriations Act, *see* App. 11a, FMCSA conducted only an Environmental Assessment ("EA") rather than a thorough EIS, and concluded that there would be no significant environmental effects, App. 107a, 128a; C.A. ER 25. For these two rules, however, FMCSA admitted that NEPA applied to its rulemaking: "*To satisfy the requirements of the National Environmental Policy Act (NEPA)*, FMCSA . . . prepared a Programmatic Environmental Assessment (PEA) to assess the impacts of the proposed rules." C.A. ER 29 (emphasis added). For the third rule, FMCSA found NEPA did not apply because the rule was "categorically excluded." App. 215a-16a. FMCSA failed to conduct a CAA conformity analysis for any of the three rules. App. 12a.

In the EA, petitioners also made a critical concession about the ramifications of the congressional preconditions: "*While*

the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect, since FMCSA would still be prohibited from processing . . . applications." C.A. ER 41 (emphasis added). Despite this, as petitioners admit, the agency's EA failed to attribute to its rules the effects of changes in truck traffic from Mexico. C.A. ER 42; Pet. for Cert. at 8.

Once the preconditions are fulfilled, and FMCSA begins processing applications to cross the border from a large number of Mexico-domiciled trucks, substantial environmental harm will result because those trucks will emit significantly larger quantities of harmful air pollutants than U.S. trucks. *See, e.g.*, C.A. ER 265-70, 362-63. These increased emissions will raise serious public health concerns. *Id.* at 340. The fine particulate matter from such emissions is linked to significant adverse health effects, including both lung cancer and non-cancer respiratory effects such as asthma. *Id.* at 342-45. Epidemiological comparisons of death rates among cities with different levels of air pollution indicate that even moderate differences in fine particle air pollution are associated with increased mortality, with a concentration in cardiovascular causes of death. *Id.* at 340, 343. This represents the largest environmental public health problem that currently exists in this country. *Id.* at 340.

6. Respondents filed timely petitions for review of the three rules. App. 13a. The petitions did not seek to interfere with the President's decision whether to lift the moratorium, but sought only to ensure that FMCSA complied with NEPA and the CAA in promulgating its own rules.

In November 2002, while the litigation was pending, the President lifted the moratorium to permit Mexico-domiciled trucks to cross the border. App. 13a-14a, 232a-34a. Despite this presidential action, Mexico-domiciled trucks were not able to travel into the United States because FMCSA still had to implement the rules that Congress had made a *separate*

pre-condition to the entry of the trucks with the consequent environmental effects. In the almost seven weeks between the time the President lifted the moratorium and the court of appeals issued its decision, FMCSA did not authorize any Mexico-domiciled trucks to travel beyond the border zones.

On January 16, 2003, the court of appeals issued a decision requiring compliance with "long-established environmental laws." App. 51a. The court first found that respondent Public Citizen has standing to pursue this challenge. App. 14a-26a. The critical determination in the standing analysis was that FMCSA's rules would cause environmental harm because trucks would be permitted to cross the border only following the proper promulgation of those rules. *See* App. 18a-22a. The lower court noted that the relief requested would not interfere with presidential action and would not affect the viability of NAFTA. App. 26a. The court of appeals instead found that "the issues before us do not touch on [the President's] clear, unreviewable discretionary authority to modify the moratorium" and that "neither the validity of nor the United States' compliance with NAFTA is before us." *Id.* Petitioners do not contest the standing decision. Pet. for Cert. at 14 n.6.

The court of appeals then addressed NEPA's statutory and regulatory requirements. The lower court found that the rules constitute "major federal actions" under NEPA because their effects cannot be artificially constrained by ignoring the uncontested fact that trucks will be permitted into this country only after the rules go into effect. *See* App. 30a-31a (referring to discussion at App. 18a-22a). The lower court also found that the rules may have a significant environmental impact. App. 31a-42a. Accordingly, the court of appeals found FMCSA acted arbitrarily and capriciously in failing to prepare an EIS. The court also found that no categorical exclusion applied. App. 43a-45a.

Finally, the court of appeals turned to the CAA claims, and held that a conformity determination was required. App. 46a-52a. The lower court found that FMCSA's actions were not subject to either of the CAA exemptions the agency advanced. First, FMCSA did not show that the total of direct and indirect emissions caused by the agency's regulations would fall below *de minimis* amounts. App. 47a-48a. Second, the court held that regulations are not categorically excluded from the conformity analysis requirement. App. 48a-51a.

After the court below issued its January 16, 2003 decision, petitioners filed a petition for rehearing and petition for rehearing *en banc*, which the court of appeals denied without a request for an *en banc* vote by Order of April 10, 2003. App. 221a-22a.

Petitioners did not seek a stay and did not file their Petition for a Writ of Certiorari until September 8, 2003. By the time they filed the Petition, FMCSA had already begun the process of conducting both an EIS and a CAA conformity analysis. Pet. for Cert. at 15 n.7.

7. Meanwhile, on February 20, 2003, after the widely publicized decision by the court of appeals, Congress passed and the President signed into law the 2003 Consolidated Appropriations Resolution, which *extended* the preconditions to the 2003 fiscal year. Pub. L. No. 108-7, Div. I, Tit. III, §348, 117 Stat. 419. Thus, Congress continued the preconditions on Mexico-domiciled trucks crossing the border, with the understanding that FMCSA must complete an EIS and a conformity analysis to meet those preconditions.

REASONS FOR DENYING THE PETITION

This is a petition in search of a problem. Despite petitioners' attempt to convert this case into a foreign policy challenge, it concerns only the routine application of domestic environmental laws to federal agency action. Additionally, the issues presented are well on their way to

resolving themselves without this Court's intervention. FMCSA is presently preparing the required EIS and conformity analysis. And, if there was ever any doubt as to whether Congress meant to require an EIS and a conformity analysis, there can no longer be any question because Congress enacted the same appropriations restriction *after* the court of appeals ruled. Moreover, the decision of the court of appeals creates no conflict among the circuits and is unlikely to do so in the future, as this case arose out of an unusual set of factual circumstances and is *sui generis*. Other than claiming that the court of appeals erred in interpreting certain provisions of NEPA and the CAA (which is neither correct nor a good reason for this Court to grant certiorari even if correct), petitioners focus only on an erroneous allegation that this case interferes with the President's role in foreign affairs. *See, e.g.*, Pet. for Cert. at 24. That claim is not implicated by the challenge to FMCSA's rules that is the subject of this case, and is not even properly before the Court because it was neither raised nor passed on below.

1. There is no reason for the Court to decide the legal questions posed by the idiosyncratic facts of this case because the matter warrants no further judicial intervention. The issue will soon resolve itself, and there is no need for the Court to intervene.

FMCSA has already "entered into a $1.8 million contract with a vendor for the preparation of the EIS and CAA analysis." Pet. for Cert. at 15 n.7. The agency also published a notice of intent to prepare the analyses. 68 Fed. Reg. 51322-23 (Aug. 26, 2003). FMCSA estimates that the studies will be complete as early as the summer of 2004. *See* Press Release, FMCSA, *FMCSA to Prepare Environmental Impact Statement Addressing Effects of Mexican Trucks in U.S., at* http://www.fmcsa.dot.gov/contactus/press/2003/082603.asp (Aug. 26, 2003). Public comments on the scope of the studies were due on November 7, 2003, and FMCSA has held nine

meetings throughout the country to obtain public input into what environmental effects and alternatives should be considered. *Id.*; 68 Fed. Reg. 58162-63 (Oct. 8, 2003).

If the Court were to hear this case, it is likely that an opinion would not issue until late spring or summer of 2004. The EIS and conformity analysis would then be close to completion. The scoping sessions are finished. The drafting of the studies would be far along by the time any opinion issued, by which point FMCSA would have already done most of the work on the project.

FMCSA's actions in this case belie its claim that the EIS and CAA processes should be cut short. The court of appeals ruled almost 10 months ago, FMCSA did not seek a stay, and the Solicitor General asked for two extensions and took 150 days from the denial of *en banc* review to file the Petition. Now, in the midst of conducting the studies—indeed, having notified the public that the agency intends to conduct the reviews and having taken comments from the public—it makes no sense to ask this Court for a ruling to permit FMCSA to cut short the processes to which it and the public have devoted significant time and resources. Petitioners point to no harm from developing the information over the next several months that will permit FMCSA to make an informed decision about the rules at issue.[1]

2. Even if the issues in this case were not well on their way to being resolved without this Court's intervention, the question of statutory interpretation on which the court of appeals ruled is no longer an even arguably open question.

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[1] Were FMCSA to contend that the Court should hear this case because of the cost of conducting the environmental reviews, it would be too late to make that argument. FMCSA has already entered into the contract. Pet. for Cert. at 15 n.7. Even were the contract voidable if the Court were to rule in FMCSA's favor, most of the money would already have been spent.

Petitioners completely ignore that the only question for the judiciary here is what Congress intended and therefore miss the implications of what has occurred since the court of appeals' decision.

NEPA and the CAA are congressional enactments, and Congress has the power to decide whether these statutes should apply in any particular case. There can be no question that Congress has the power to enact a statute requiring an EIS and a conformity analysis before FMCSA permits trucks to cross the border. The only question is whether Congress did mandate such analyses via the preconditions in the appropriations process. That question is readily answered by what Congress did *after* the court of appeals ruled.

Congress legislates with judicial review as a backdrop. *See, e.g., Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148, 2151 (2003). More particularly, the doctrine of ratification provides that "Congress is presumed to be aware of a . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

In this case, the court of appeals filed its decision finding the rules did not comply with NEPA and the CAA on January 16, 2003. The court found that the 2002 DOT Appropriations Act "conditioned funding for permitting Mexican truck traffic into the United States" on the challenged rules, that the rules were an independent cause of trucks being permitted to cross the border, and that the rules therefore caused environmental effects. App. 9a, 19a-23a, 30a-31a, 47a. That decision received widespread publicity in the Washington Post, New York Times, Wall Street Journal, Los Angeles Times, CBS Evening News, and other media sources.

At that point, Congress had the complete power to express its disapproval by stating that nothing in the appropriations language required an EIS or a conformity analysis. Congress

knows how to use such power in the context of the appropriations process, and has exempted certain activities from NEPA's application, including in response to litigation. *See, e.g.*, 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, Tit. I, Chap. 7, §§706(a)(3), (j), 116 Stat. 864, 868 ("actions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA").

Congress did not take such action here. To the contrary, after the lower court's ruling Congress affirmatively *extended* the same restrictions for the 2003 fiscal year. In so doing, Congress ratified and adopted the court of appeals' ruling.

That Congress took affirmative action to provide for the continued vitality of the preconditions in this case is of particular significance. Although congressional inaction has generally been rejected as an interpretive aid, *see, e.g., Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186-87 (1994), affirmative congressional reenactment is recognized as a highly persuasive indicator of congressional intent, *see, e.g., id.* at 185.

Application of the doctrine of ratification is particularly appropriate given the public policy issues involved in this case. Although petitioners mischaracterize this case as one that involves interference with the President's foreign-affairs power rather than as a simple exercise of Congress' power, this matter undeniably implicates public policy considerations. By reenacting the appropriations language after the court of appeals' decision, Congress spoke on how to balance the competing public policy concerns at issue. It is not the province of the judiciary to question the soundness of Congress' judgment in this arena. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (noting "exclusive

province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation"). As Congress has clearly manifested its intent in the 2003 fiscal year, there is no reason for this Court to decide whether the court of appeals was correct about what Congress meant in the 2002 DOT Appropriations Act.

3. Petitioners ignore that all the decision below did is enforce a congressional act, and instead argue that this challenge seeks to interfere with the President's constitutional power over foreign affairs. This argument is based on a misconception of this case, which we explain below. As a threshold matter, however, the argument is not properly before the Court because petitioners *failed to raise the issue below*, and the court of appeals therefore did not address whether its decision unconstitutionally impeded the President's foreign-affairs powers.

a. This Court's "traditional rule" is that it will not hear a case "when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 258-60 (1987) (per curiam) (dismissing writ of certiorari as improvidently granted).

The present petitioners, as respondents in the court of appeals, did not press the President's foreign-affairs power. Instead, they argued (incorrectly) that environmental effects would occur only "as a result of future action that the President may take with respect to trade policy" and "as a result of modifying the moratorium." C.A. Resp. Brief at 35, 47. They also claimed that the court of appeals should not question "the wisdom of the decision to liberalize trade barriers" under NAFTA. C.A. Resp. Supp. Brief. at 13. Neither in their merits briefs nor in oral argument, however,

did petitioners argue that an adverse decision could interfere with the President's constitutional power over foreign affairs. Likewise, the court of appeals' opinion does not address the foreign-affairs argument that petitioners now raise. Accordingly, this Court should decline to grant certiorari to address the President's foreign-affairs power.

b. Notwithstanding their failure to raise the issue below, petitioners now claim that the foreign-affairs question is important enough to warrant review by this Court. Properly understood, however, there is *no* foreign affairs issue in this case.

Petitioners suggest that this case poses the question whether the President's action in lifting the moratorium is subject to NEPA, and argue that the court of appeals required "a full NEPA review of the President's foreign-policy decision to open the border." Pet. for Cert. at 15. As if repetition would make it so, petitioners repeat similar assertions throughout. *See id.* at 2, 15, 16, 17, 21, 22. But respondents do not make such a claim, and the court of appeals did not so hold.

Respondents do *not* challenge any presidential action in lifting the moratorium or otherwise, nor do they challenge NAFTA. Rather, they challenge a *federal agency's* failure to conduct statutorily required environmental reviews before promulgating and implementing rules as required by Congress. Challenges to such actions are wholly proper. *See, e.g., Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (stating presumption that Congress "expects the courts to grant relief" if federal agency violates statutory command). Here, FMCSA did not conduct environmental reviews required by statute. Actions challenging such failure are commonplace.

That FMCSA and the President both have roles to play in making decisions about cross-border trucking does not

preclude judicial review of *FMCSA's* compliance with environmental laws. The Administrative Procedure Act permits review of "final agency action." 5 U.S.C. §704; *see also Bennett v. Spear*, 520 U.S. 154, 175 (1997); *id.* at 177-78 (agency action is final when it marks "consummation of the agency's decisionmaking process" and either "rights or obligations have been determined" or "legal consequences will flow") (internal quotation marks omitted). Petitioners did not dispute below that FMCSA's rules at issue constitute final agency action regardless of the President's entirely separate decision about whether to lift the moratorium, and the test for final agency action is readily met here.[2]

This is not a case where an agency merely provides a *recommendation* to the President, who then has final decisionmaking authority, and hence the agency recommendation does not constitute final agency action. *See Franklin v. Massachusetts*, 505 U.S. 788, 797-99 (1992). Unlike the situation in *Franklin*, the rules here are not a recommendation, as there is no further action for the President to take with respect to them. Moreover, under the appropriations language, FMCSA's action has independent, legally operative effect with respect to whether Mexico-domiciled trucks will be permitted to cross into this country. In *Bennett*, the Court clarified the limited nature of *Franklin*, noting that "our holding that this [action] did not constitute 'final agency action' was premised on the observation that the report carried 'no direct consequences' and served 'more like a tentative recommendation than a final and binding determination.'" 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798). In other words, challenges to

[2] Notably, the EIS here will be far from the first EIS conducted against the backdrop of an international agreement. For instance, the Air Force prepared an EIS with regard to deactivation of a missile system that would be required by a treaty between the United States and Russia. *See* 64 Fed. Reg. 31553-34 (June 11, 1999).

administrative proceedings that are final without presidential action are permitted.

Here, the court of appeals did not review the President's action, finding that "the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium." App. 26a. The lower court reviewed only agency action. App. 51a. Petitioners are simply wrong in asserting to the contrary. *See* Pet. for Cert. at 25.

Nor did the court of appeals interfere with any commitments of this country. NAFTA expressly preserves the applicability of domestic environmental laws, and the NAFTA arbitration panel decision did not address the enforcement of those laws. Far from interfering with NAFTA, the court of appeals required compliance with its terms.

This case is about routine enforcement of domestic environmental laws. Those laws constrain agency action for the purpose of protecting the environment, a function that NAFTA expressly allows and Congress has required. Moreover, to the extent this case touches on relations with foreign governments, it does so with respect to *foreign commerce*. As petitioners recognize, Congress has the power to regulate foreign commerce. Pet. for Cert. at 3.

Petitioners do not contest Congress' power to impose preconditions on FMCSA's processing of applications for trucks to cross the border. But petitioners mistake these preconditions as conditions on the President's lifting of the moratorium. *See* Pet. for Cert. at 25. By their terms, the preconditions apply to the *agency's* expenditure of funds to review or process applications. Pub. L. 107-87, §350(a). The preconditions do not apply to the President's act of lifting the moratorium, which was not constrained by the appropriations language. Congress acted well within its authority in imposing preconditions on agency action; and in so doing,

Congress did not impinge on the power of the President to conduct foreign affairs.

4. The court of appeals correctly held that an EIS and a CAA conformity analysis are required. We start with NEPA.

There is no dispute that FMCSA must comply with NEPA. *See* 42 U.S.C. §4332(2) (applying EIS requirement to "all agencies of the Federal Government"). Congress provided that "major Federal actions significantly affecting the quality of the human environment" require an EIS. 42 U.S.C. §4332(2)(C). We address the two basic prerequisites—"major Federal actions" and "significantly affecting the environment"—separately.

a. The Council on Environmental Quality ("CEQ") regulations implementing NEPA are "binding on all Federal agencies." 40 C.F.R. §1500.3. The CEQ regulations state: "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. §1508.18 (emphasis omitted). Petitioners take issue only with whether the federal agency action has "effects" that trigger the EIS requirement. The CEQ regulations define "effects" to include "[i]ndirect effects, which are *caused by* the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*." 40 C.F.R. §1508.8(b) (emphases added).

With respect to the causation prong of the analysis, the rules at issue fulfill congressional preconditions on permitting Mexico-domiciled trucks to cross the border. *See* App. 53a-54a, 125a, 210a. As such, the rules are a prerequisite for Mexico-domiciled trucks to travel outside the designated border commercial zones with the attendant environmental effects. Without implementation of the challenged rules, it would be illegal for the agency to spend any appropriated money to process applications that would allow Mexico-

domiciled trucks to travel to interior points in the United States. The effects of admitting such trucks are therefore caused by FMCSA's rules.

The President's authority to lift the moratorium on trucks crossing the border does not break the causal connection between the rules and environmental effects. Because of the congressional preconditions, *no matter what happens* with regard to the moratorium, Mexico-domiciled trucks cannot travel throughout the United States unless the challenged rules are implemented. That is why FMCSA admitted in the EA: "While the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect." C.A. ER 41. Similarly, petitioners concede:

> The spending restrictions of Section 350 did establish the promulgation of FMCSA's safety rules as a *condition precedent* to processing Mexican carriers' applications for operating authority under the regulatory statutes administered by FMCSA. That function of processing applications is *separate* from the President's decision to lift the moratorium.

Pet. for Cert. at 19-20 (emphases added).

The challenged rules cause environmental effects because *regardless* of what the President does, Congress has prohibited FMCSA from processing applications from Mexico-domiciled trucks until the rules are in place. Nor is FMCSA merely "implementing a policy of the President" in promulgating the rules. Pet. for Cert. at 16. Rather, *Congress* made the *agency's* action a precondition to the entry of Mexico-domiciled trucks. FMCSA is only implementing presidential policy in the sense that *every* executive branch agency in every situation is in some sense implementing the President's policy. This does not affect the applicability of NEPA. The court of appeals recognized this, noting several times that the actions of the President and the agency were

independent (App. 19a, 21a), and finding that "both had to take action for the event to occur." App. 19a.

To be sure, in certain circumstances "but for" causation by itself may not be sufficient to establish the requisite causal link. *See Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766, 773-74 (1983). This is not one of those cases. Unlike in *Metropolitan Edison*, where the issue was possible psychological harm from the risk of a nuclear accident, the harm here is classic harm to the physical environment. The case here is no different from the numerous NEPA matters where an agency must prepare an EIS before issuing a permit even though other independent action must also take place before environmental effects will result. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 336-37 (1989) (Forest Service "special use permit" that authorizes development of ski resort constitutes "major Federal action"); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 299, 318-19 (1975) (Interstate Commerce Commission general revenue proceeding that was necessary for railroad companies to raise rates, which could cause environmental harm, is "major federal action").

Even were this a case where "but for" causation were not itself sufficient, the courts would still be required to "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Metropolitan Edison*, 460 U.S. at 774 n.7. This is a particularly strong case with respect to the underlying policies and legislative intent because they are revealed not only by general indications but also by very specific congressional commands. NEPA's general policies are comprehensive. *See, e.g.*, 42 U.S.C. §4332 (NEPA must be applied "to the fullest extent possible"); *Robertson*, 490 U.S. at 348-50 (discussing NEPA's broad purposes). More important, Congress confirmed that it intended FMCSA's actions to be

subject to NEPA when, after the lower court's decision requiring an EIS, Congress reenacted express appropriations language to continue to make the rules a precondition for cross-border trucking.

With respect to the foreseeability prong of the analysis, it was certainly foreseeable that implementing the rules would lead to adverse environmental effects. Petitioners complain that the court of appeals based its holding that FMCSA must prepare an EIS on a finding that "the President's lifting of the moratorium was a 'reasonably foreseeable' consequence of FMCSA's rulemakings." Pet. for Cert. at 15 (quoting App. 31a). Petitioners mistake the holding of the court of appeals. When the lower court noted "that the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared and the decision not to prepare an EIS was made" (App. 31a), the court was not making a finding that the rules would *cause* the President's action. The court of appeals was merely stating that, as petitioners concede, the President had already made up his mind to lift the moratorium; therefore, it was "reasonably foreseeable" that, if FMCSA implemented the rules, environmental effects would occur. In other words, in a situation where there are two independent causes of environmental effects, and one of them is a forgone conclusion, the second cause has effects that are reasonably foreseeable.

Petitioners make a similar mistake in arguing that the court of appeals' opinion subjects a presidential decision to NEPA. Pet. for Cert. at 16. As we have previously explained, this is not a challenge to presidential action. It is not the President's decision that is subject to review—it is the promulgation of the rules. The relevant question is whether the *agency's* actions will significantly affect the environment.[3]

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[3] The regulatory scheme ensures in many different ways that agencies cannot evade environmental review. *See, e.g.*, 40 C.F.R. §1508.25(a)(2) (cumulative actions); 40 C.F.R. §1508.7 (cumulative impact); 40 C.F.R.

b. With respect to whether FMCSA's rules "significantly affect[] the quality of the human environment," 42 U.S.C. §4332(2)(C), FMCSA refused to prepare an EIS under two separate rationales. For two of the rules, FMCSA claimed that the EA demonstrated no significant effects. App. 107a, 128a. FMCSA claimed the remaining rule was categorically excluded from NEPA. App. 215a-16a. Petitioners do not challenge the court of appeals' finding that no categorical exclusion applies. Pet. for Cert. at 13 n.5.

Petitioners continue to rely on the contention that the President's decision to lift the moratorium—not FMCSA's rules—is the cause of the environmental effects. *See* Pet. for Cert. at 20-21. Again, however, because of the congressional appropriations preconditions, nothing the President did by himself could cause the trucks to cross the border absent promulgation and implementation of FMCSA's rules.

Petitioners make no attempt to explain why, if the rules constitute "major federal action" as demonstrated above, they do not significantly affect the environment. The court of appeals carefully applied CEQ regulations interpreting "significant" effects on the environment and determined that the EA was inadequate. App. 31a-42a. Petitioners do not rebut, and therefore concede, that the EA does not properly analyze localized effects (App. 33a), long-term effects (App. 34a), effects on public health and safety (App. 35a), uncertain environmental effects (App. 35a-39a), and effects on California air pollution laws (App. 39a-40a); nor do they contest that the rulemaking concerns a controversial matter (App. 40a-42a).

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§1508.25(a)(1) (connected actions). Petitioners take issue with the court of appeals' reliance on cumulative effects. Pet. for Cert. at 17. In so doing, petitioners attempt to limit consideration of cumulative effects to the effects of FMCSA's actions. *Id.* But the CEQ regulations do not so limit the scope of cumulative effects. *See* 40 C.F.R. §1508.7. The cumulative effects are another reason FMCSA should have prepared an EIS.

It is important to understand that the court of appeals' decision does not demand that the EIS examine any particular alternative or that the agency reach a particular result. *See* App. 39a; *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) ("NEPA . . . simply guarantees a particular procedure, not a particular result."). NEPA merely mandates "action-forcing procedures that require that agencies take a hard look at environmental consequences." *Robertson*, 490 U.S. at 350 (internal quotation marks omitted).

At the same time, however, an EIS is an important, mandatory requirement. The two arguments that petitioners make to excuse their failure to conduct an EIS on grounds of "common sense" do not apply. *See* Pet. for Cert. at 18.[4] First, although it is certainly true that a "rule of reason" applies to the content of an EIS once an agency decides to prepare one, *see* 40 C.F.R. §1502.2(b), it is of no moment that an EIS requires only a brief discussion of insignificant issues, as respondents have submitted to the agency numerous *significant* environmental issues that need to be addressed. Second, the suggestion that obtaining information would require an exorbitant cost is not only erroneous but moot because FMCSA has already contracted to have the EIS prepared. Petitioners have not shown that the cost of this EIS is more than many other EIS's that federal agencies have been required to undertake. To the extent petitioners invite resort to "common sense" rather than the law, they miss the most important commonsense issue here: Under NEPA, severe environmental effects may not occur until full information is available.

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[4] In addition, this argument was not raised below and is therefore waived.

c. Nor can petitioners prevail by claiming that FMCSA is not an environmental agency, has no control over environmental effects, and is "lacking any regulatory responsibility for . . . motor vehicle emissions." Pet. for Cert. at 6, 15, 17. NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment" without regard to the agency's power to protect the environment. 42 U.S.C. §4332(2)(C). The statute ensures that environmental issues are considered along with more traditional priorities. *See, e.g.*, 42 U.S.C. §4332(2)(B). NEPA specifically makes its policies and goals "*supplementary* to those set forth in existing authorizations of Federal agencies." 42 U.S.C. §4335 (emphasis added). Courts have frequently applied NEPA to agencies possessing statutory duties that do not explicitly concern environmental issues. *See, e.g., Aberdeen*, 422 U.S. at 318-19 (holding Interstate Commerce Commission's general revenue proceeding requires EIS so long as proceeding has substantial environmental effect). Nor does anything in FMCSA's statutory authorization expressly prohibit or make impossible compliance with NEPA, which is the standard under 40 C.F.R. §1500.6.

Moreover, the actions that FMCSA takes with regard to the rules will have a direct relation to environmental effects. The EA states that through the rules "FMCSA expects to target the highest risk [trucks] and bring them into compliance with United States safety *and environmental* laws, standards, policies, rules, and regulations." C.A. ER 114 (emphasis added); *see also* App. 91a (noting agency added language to application form stating that compliance with environmental laws is mandatory). Moreover, in the court of appeals, FMCSA admitted that *the safety related requirements* the challenged rules impose on Mexico-domiciled trucks *have important environmental implications*: FMCSA suggested that increased emissions from Mexico-domiciled trucks will not be as great because "the heightened standards put into

place by the challenged safety rules will tend to restrict the number of older (pre-1993) Mexican trucks that can be operated in the United States." C.A. Resp. Brief at 58; *see also* C.A. Resp. Supp. Brief at 11 n.4. (It is these older trucks that are the most polluting.) If increasing the stringency of safety standards to the extent required by the challenged rules is likely to produce corresponding environmental benefits, then increasing the stringency even more should yield even greater environmental benefits. FMCSA has non-ministerial discretion to choose amongst various options and in so doing to alleviate environmental effects.[5]

Additionally, FMCSA may have other ways to protect the environment from some of the adverse effects of certifying Mexico-domiciled trucks to travel to interior points within the United States. *See* 42 U.S.C. §4332(2)(C)(iii) (providing that EIS should discuss "alternatives to the proposed action"). For example, FMCSA could engage in cooperative agreements to include emissions inspections with safety inspections. The focus on alternatives to environmentally destructive action that is the hallmark of NEPA's EIS requirement is meant to stimulate agencies to identify and examine innovative options for protecting the environment while accomplishing the agency's primary goals. *See, e.g., Robertson*, 490 U.S. at 351 ("one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental conse-

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[5] Petitioners' argument that this point is waived because it was not raised until a reply brief (Pet. for Cert. at 21 n.10) is unavailing. The point was rebuttal to an argument raised in the opposition brief, as permitted by the court of appeals. *See, e.g., United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (per curiam). Additionally, this Court will entertain an argument that was either "pressed *or* passed upon below." *Williams*, 504 U.S. at 41 (emphasis added). Because the court of appeals addressed the issue, App. 23a, 42a, it is properly before this Court.

quences").[6] FMCSA is required to consider these issues just like every other agency.[7]

5. The court of appeals also interpreted the CAA correctly. A federal "department, agency, or instrumentality" is forbidden from supporting or approving an activity that fails to conform to state plans to achieve air quality standards. 42 U.S.C. §7506(c)(1).[8] Federal agencies must make a determination that an action conforms to the relevant state air quality plan based upon a conformity analysis before taking an action that will cause direct or indirect emissions that exceed certain levels. *See* 40 C.F.R. §§93.150(b), 93.153(b), 93.154.[9]

Petitioners concede that agencies must consider both "direct emissions" and "indirect emissions" in performing a conformity analysis. Pet. for Cert. at 23. The emissions from Mexico-domiciled trucks fall within the definition of "indirect emissions," which "[a]re caused by the Federal action, but may occur later in time and/or may be further

[6] Moreover, compliance with NEPA will provide important information to agency decisionmakers and the public, which is an important purpose of the statute. *See Robertson*, 490 U.S. at 349; 40 C.F.R. §1500.1(b).

[7] Petitioners' suggestion that they should have had a chance to determine whether to prepare an EIS on remand even though the court of appeals found an EIS to be necessary (Pet. for Cert. at 18-19 n.8) was not raised below and is therefore waived. Nor is this a sufficient reason for the Court to grant review even if it were correct and not waived. In any event, given the record of potentially severe environmental consequences in this case, App. 33a-40a, there is no question that an EIS is necessary to fulfill NEPA's purposes.

[8] Petitioners' authorities do not stand for the proposition that the President is not an instrumentality under the CAA. As FMCSA is unquestionably subject to the CAA, however, this issue need not be reached.

[9] FMCSA relied below on an exemption for certain rulemakings, but petitioners no longer raise this argument. Pet. for Cert. at 10 n.4.

removed in distance from the action itself but are still reasonably foreseeable," and which "[t]he Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." 40 C.F.R. §93.152. Petitioners do not contest the first prong of the test.

As to the second prong, "continuing program responsibility" has the following meaning under the regulations: "When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility." 40 C.F.R. §93.152. FMCSA is conducting its normal responsibilities in promulgating and implementing the challenged rules. As we have shown, this action will result in emissions because the rules will result in Mexico-domiciled trucks traveling beyond the border commercial zones and emitting pollution. As such, the rules come within the definition of "continuing program responsibility."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 10, 2003

APPENDIX

APPENDIX

Additional Provisions Involved

1. North American Free Trade Agreement and Implementation Act

a. Chapter 9, Article 904(1) of the North American Free Trade Agreement provides as follows:

> Each Party may, in accordance with this Agreement, adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable requirements of those measures or to complete the Party's approval procedures.

b. 19 U.S.C. §3312(a)(1) provides as follows:

> No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

2. 2002 Department of Transportation and Related Agencies Appropriations Act

Section 350(a) of Pub. L. 107-87, 115 Stat. 864-66, provides as follows:

> No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border until the Federal Motor Carrier Safety Administration—

(1)(A) requires a safety examination of such motor carrier to be performed before the carrier is granted conditional operating authority to operate beyond United Statesmunicipalities and commercial zones on the United States-Mexico border;

(B) requires the safety examination to include—

(i) verification of available performance data and safety management programs;

(ii) verification of a drug and alcohol testing program consistent with part 40 of title 49, Code of Federal Regulations;

(iii) verification of that motor carrier's system of compliance with hours-of-service rules, including hours-of-service records;

(iv) verification of proof of insurance;

(v) a review of available data concerning that motor carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations;

(vi) an inspection of that Mexican motor carrier's commercial vehicles to be used under such operating authority, if any such commercial vehicles have not received a decal from the inspection required in subsection (a)(5);

(vii) an evaluation of that motor carrier's safety inspection, maintenance, and repair facilities or management systems, including verification of recordsof periodic vehicle inspections;

(viii) verification of drivers' qualifications, including a confirmation of the validity of the Licencia de Federal de Conductor of each driver of that motor carrier who will be operating under such authority; and

(ix) an interview with officials of that motor carrier to review safety management controls and evaluate any written safety oversight policies and practices.

(C) requires that—

(i) Mexican motor carriers with three or fewer commercial vehicles need not undergo on-site safety examination; however 50 percent of all safety examinations of all Mexican motor carriers shall be conducted onsite; and

(ii) such on-site inspections shall cover at least 50 percent of estimated truck traffic in any year.

(2) requires a full safety compliance review of the carrier consistent with the safety fitness evaluation procedures set forth in part 385 of title 49, Code of Federal Regulations, and gives the motor carrier a satisfactory rating, before the carrier is granted permanent operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border, and requires that any such safety compliance review take place within 18 months of that motor carrier being granted conditional operating authority, provided that—

(A) Mexican motor carriers with three or fewer commercial vehicles need not undergo onsite compliance review; however 50 percent of all compliance reviews of all Mexican motor carriers shall be conducted on-site; and

(B) any Mexican motor carrier with 4 or more commercial vehicles that did not undergo an on-site safety exam under (a)(1)(C), shall undergo an on-site safety compliance review under this section.

(3) requires Federal and State inspectors to verify electronically the status and validity of the license of each driver of a Mexican motor carrier commercial vehicle crossing the border;

(A) for every such vehicle carrying a placardable quantity of hazardous materials;

(B) whenever the inspection required in subsection (a)(5) is performed; and

(C) randomly for other Mexican motor carrier commercial vehicles, but in no case less than 50percent of all other such commercial vehicles.

(4) gives a distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours-of-service rules under part 395 of title 49, Code of Federal Regulations;

(5) requires, with the exception of Mexican motor carriers that have been granted permanent operating authority for three consecutive years—

(A) inspections of all commercial vehicles of Mexican motor carriers authorized, or seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border that do not display a valid Commercial Vehicle Safety Alliance inspection decal, by certified inspectors in accordance with the requirements for a Level I Inspection under the criteria of the North American Standard Inspection

(as defined in section 350.105 of title 49, Code of Federal Regulations), including examination of the driver, vehicle exterior and vehicle under-carriage;

(B) a Commercial Vehicle Safety Alliance decal to be affixed to each such commercial vehicle upon completion of the inspection required by clause (A) or a re-inspection if the vehicle has met the criteria for the Level I inspection; and

(C) that any such decal, when affixed, expire at the end of a period of not more than 90 days, but nothing in this paragraph shall be construed to preclude the Administration from requiring reinspection of a vehicle bearing a valid inspection decal or from requiring that such a decal be removed when a certified Federal or State inspector determines that such a vehicle has a safety violation subsequent to the inspection for which the decal was granted.

(6) requires State inspectors who detect violations of Federal motor carrier safety laws or regulations to enforce them or notify Federal authorities of such violations;

(7)(A) equips all United States-Mexico commercial border crossings with scales suitable for enforcement action; equips 5 of the 10 such crossings that have the highest volume of commercial vehicle traffic with weigh-in-motion (WIM) systems; ensures that the remaining 5 such border crossings are equipped within 12 months; requires inspectors to verify the weight of each Mexican motor carrier commercial vehicle entering the United States at said WIM equipped high volume border crossings; and

(B) initiates a study to determine which other crossings should also be equipped with weigh-in-motion systems;

(8) the Federal Motor Carrier Safety Administration has implemented a policy to ensure that no Mexican motor carrier will be granted authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border unless that carrier provides proof of valid insurance with an insurance company licensed in the United States;

(9) requires commercial vehicles operated by a Mexican motor carrier to enter the United States only at commercialborder crossings where and when a certified motor carrier safety inspector is on duty and where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of said inspections.

(10) publishes—

(A) interim final regulations under section 210(b) of the Motor Carrier Safety Improvement Act of 1999 (49 U.S.C. 31144 note) that establish minimum requirements for motor carriers, including foreign motor carriers, to ensure they are knowledgeable about Federal safety standards, that may include the administration of a proficiency examination;

(B) interim final regulations under section 31148 of title 49, United States Code, that implement measures to improve training and provide for the certification of motor carrier safety auditors;

(C) a policy under sections 218(a) and (b) of that Act (49 U.S.C. 31133 note) establishing standards

for the determination of the appropriate number of Federal and State motor carrier inspectors for the United States-Mexico border;

(D) a policy under section 219(d) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor-carriers from leasing vehicles to another carrier to transport products to the United States while the lessor is subject to a suspension, restriction, or limitation on its right to operate in the United States; and

(E) a policy under section 219(a) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor carriers from operating in the United States that is found to have operated illegally in the United States.

3. Clean Air Act

40 C.F.R. §93.152 provides in part:

When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

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No. 03-358

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This is anything but the "routine" case (Br. in Opp. 9) respondents make it out to be. The court of appeals incorrectly construed and applied the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the conformity-review requirement of the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1), to override Presidential discretion that those statutes preserve. The Ninth Circuit's unwarranted extension of NEPA and the CAA to require environmental review of a foreign affairs decision that is within the President's sole discretion "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000); see Pet. 24-25. Furthermore, looking no further than this particular case, the decision below is delaying substantially the United States' compliance with the arbitration decision of February 2001,

thereby preventing the resolution of a trade dispute that affects millions of border crossings each year and that, Mexico asserts, is causing billions of dollars of economic injury. See Pet. 24-26.

I. THE INTERFERENCE WITH PRESIDENTIAL DISCRETION WILL NOT "RESOLVE ITSELF" AND HAS NOT BEEN RATIFIED BY CONGRESS

A. Respondents' first argument against review by this Court is that, because the Federal Motor Carrier Safety Administration (FMCSA) has begun the environmental review required by the court of appeals despite the pendency of the instant petition, the case "will soon resolve itself." Br. in Opp. 10. That is plainly wrong. As the petition explains (at 15 n.7), FMCSA has entered into a contract for preparation of the Environmental Impact Statement (EIS) and CAA analysis contemplated by the court of appeals, if that analysis is required. There is no genuine possibility that FMCSA would complete the necessary work before the end of this Court's current Term. See Br. in Opp. 10. Moreover, the agency's CAA review might thereafter require additional consideration of air emissions in certain areas. And because the court of appeals' decision provides respondents future opportunities to attempt to prevent opening of the border by again claiming that FMCSA undertook inadequate environmental review, another judicial challenge to FMCSA's safety rules would be virtually certain. Unless the Court intervenes, resolution of this dispute is unlikely until 2005 or 2006 at the earliest—and that assumes the Ninth Circuit would reject any subsequent challenge.

Trying to downplay the significance of that delay, respondents assert (Br. in Opp. 17) that the Ninth Circuit's decision does not "interfere with any commitments of this country." Undeniably, however, the decision below is preventing the United States from implementing the February 2001 arbi-

tration decision that found a NAFTA violation. See Pet. 5, 26.

B. Respondents similarly are incorrect when they contend (Br. in Opp. 11-14, 20-21) that, in February 2003, Congress ratified the court of appeals' decision by re-enacting Section 350, the appropriations rider that governs FMCSA's expenditure of funds on registering new operations of Mexican motor carriers. See Pet. 7 (discussing rider). Section 350 addressed *safety* issues associated with the registration of the Mexican trucks that would be permitted to enter the United States under the President's decision to open the border. Section 350 did not amend the environmental statutes on which the court of appeals relied and it makes no mention of environmental issues. As respondents concede, such legislative inaction "has generally been rejected as an interpretive aid." Br. in Opp. 13 (citing *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994)).

Respondents' ratification argument seems to be that, by reenacting the appropriations rider a few weeks after the Ninth Circuit panel issued its decision in this case, Congress endorsed the practical result of delaying implementation of the President's border-opening decision. See Br. in Opp. 12-14. There was no such congressional endorsement. The court of appeals entered its judgment on January 16, 2003. Pet. App. 2a. The rider was in the Fiscal Year 2003 appropriations bill when it was reported by the Senate Committee on Appropriations in July 2002—six months *before* the Ninth Circuit rendered its decision in this case. See 148 Cong. Rec. S7429-S7430 (daily ed. July 26, 2002); S. Rep. No. 224, 107th Cong., 2d Sess. 85 (2002).

Moreover, the Senate Committee's reasons for including the rider were unrelated to the instant litigation. The Senate Report focused entirely on safety concerns. When the Report was issued, FMCSA already had published its

final safety rules, and the Senate Report addressed one task that remained to be performed under Section 350: the Secretary of Transportation's consideration of findings by the agency's Inspector General that opening the border does not pose an unacceptable safety risk. See S. Rep. No. 224, *supra*, at 84-85. Notably, respondents do not suggest that legislators considered the decision below in connection with the appropriations process, see Br. in Opp. 12-13, and there is no evidence that they did.

In any event, Congress's unexplained reenactment of Section 350, which makes no mention of environmental concerns, says nothing about the question before this Court: whether the court of appeals correctly applied the environmental laws to a foreign affairs determination of the President.

II. THE COURT OF APPEALS ERRONEOUSLY REQUIRED THE PREPARATION OF AN EIS CONCERNING THE PRESIDENT'S DISCRETIONARY DECISION

A. The petition explains (at 14-19) that the President's border-opening decision is exempt from NEPA's EIS requirement, and that the exemption of Presidential action cannot properly be overridden by treating the border opening as an effect of FMCSA's safety rules. Respondents argue (at 14-15) that this issue was not preserved below. Again, respondents are mistaken.

In the court of appeals, the government argued precisely that respondents "misappl[ied] [Council on Environmental Quality (CEQ)] guidelines as to the proper scope of NEPA analysis" in urging the application of the EIS requirement to "effects that may result from a Presidential decision to modify the trade moratorium." Gov't C.A. Br. 50-51; see *id.* at 53 ("[T]he President's discretionary action on the moratorium * * * cannot be said to be 'caused by' [FMCSA's] rulemaking."), 54 (environmental impacts alleged by respondents "are * * * impacts of the moratorium modification alone"). The government made the same argument in the stay proceedings below, see Gov't Response in Opp. to Pet.'s Mot. for an Emergency Stay Under Circuit Rule 27-3, at 8 ("[T]he *President's* actions relating to international trade and the trade moratorium * * * are beyond this Court's review."); *id.* at 17 (citing potential harm to "diplomatic relations and the President's conduct of foreign affairs"), and in its petition for rehearing and rehearing en banc (at 1) ("At issue is the ability of the President to conduct foreign affairs and trade policy free of interference from the courts."). Although the court of appeals disagreed with the government's position, it clearly understood that the government had raised the issue whether the President's decision to open the border is exempt from NEPA review. See Pet. App. 26a, 30a-31a, 47a, 51a.

B. Respondents next suggest (Br. in Opp. 17) that the President's ability to exercise his lawful discretion is not genuinely at issue in this case because Congress has the power to regulate foreign commerce. As the petition explains (at 4, 25), Congress has vested the President with sole authority to lift the moratorium on cross-border operations. The President's discretionary decision to take that step in response to the February 2001 ruling of the international arbitration panel is an exercise of the *combined* authority of both Political Branches.

C. FMCSA had no authority, either before or after the enactment of Section 350, to override the President's determination to lift the moratorium or to impose its own bar to the entry of Mexican trucks and buses. Because FMCSA operates under a statutory mandate to grant registration to all domestic and foreign carriers that are "willing and able to comply with" applicable safety and financial responsibility requirements, 49 U.S.C. 13902(a)(1), FMCSA's task was confined to issuing appropriate rules to govern the safe opera-

tions of trucks and buses that would be allowed to enter the United States when *the President* lifted the moratorium. Because FMCSA has no authority to prohibit the entry of those vehicles into the United States, it had no obligation to prepare an EIS to examine the environmental consequences of either allowing entry or maintaining a general prohibition.

Respondents further contend (Br. in Opp. 18-23) that FMCSA was required to prepare an EIS addressing the President's border-opening decision because, under the appropriations rider, "Mexico-domiciled trucks cannot travel throughout the United States unless the challenged rules are implemented," *id.* at 19. Respondents echo the court of appeals' view (Pet. App. 30a-31a) that, under the CEQ regulations implementing NEPA, any environmental effects of opening the border are "caused by" FMCSA's safety rules, see 40 C.F.R. 1508.8(b), because "Congress has prohibited FMCSA from processing applications from Mexico-domiciled trucks until the rules are in place," Br. in Opp. 19.

The Ninth Circuit's "but for" approach is inconsistent with NEPA and the CEQ regulations, for the reasons stated in the petition (at 14-18). First, that approach would in practical effect subject to NEPA analysis a decision of the President that is expressly exempt from NEPA under 40 C.F.R. 1508.12. Second, it would require FMCSA, which is vested under its authorizing statute strictly with safety responsibilities (see Pet. 6), to treat its 2002 safety rules as the "cause" of a border-opening action that the President made in 2001, and that FMCSA has no power to change. Third, in compelling FMCSA to suspend its safety rules while it prepares an EIS addressing a NEPA-exempt determination that the President made several years ago in light of foreign-affairs considerations—and thereby delaying this Nation's compliance with NAFTA and the 2001 arbitral decision—the "but for" approach does nothing to advance NEPA's purpose

of "help[ing] public officials make decisions." 40 C.F.R. 1500.1(c).

The decisions respondents cite as being "no different" from the use of a "but for" approach (Br. in Opp. 20) are entirely unhelpful to them. In *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989), the Forest Service prepared an EIS to assist its own discretionary decision whether to grant a permit for the construction of a ski resort on federal land. See *id.* at 336-338. Similarly, in *Aberdeen & Rockfish Railroad* v. *SCRAP*, 422 U.S. 289 (1975), the subject of the EIS prepared by the Interstate Commerce Commission was the environmental impact of the Commission's *own* decision concerning rates for rail transport. See *id.* at 297-306. *SCRAP* in fact confirms that NEPA review is not required if "no purpose [would be] served" by such review. *Id.* at 325. That is precisely the situation here.

Respondents also assert (Br. in Opp. 21) that "[i]t is not the President's decision that is subject to review" under the court of appeals' decision, but rather FMCSA's rules. See *id.* at 2 ("This case does not involve the application of the environmental laws to a presidential decision."). The court of appeals disagreed. It declared that any "distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry" is "illusory," Pet. App. 47a, and it concluded that "the President's rescission of the moratorium was [a] 'reasonably foreseeable' [effect]" of FMCSA's regulations that should have been studied by the agency, *id.* at 31a. Under the decision below, the action that FMCSA must examine in an EIS is *the President's* decision to lift the moratorium on new cross-border operations.

D. Finally, respondents argue (Br. in Opp. 25) that FMCSA's NEPA review was deficient because FMCSA might have been able to tailor its safety regulations to "alleviate environmental effects" of the President's decision.

As pointed out in the certiorari petition (at 21-22 n.10), however, none of the respondents argued in FMCSA's rulemaking proceedings that FMCSA should consider alternative rules, let alone adopt especially stringent *safety* requirements so as to prevent Mexican trucks from meeting those requirements and thereby lessen any *environmental* consequences of the President's border opening. There is, moreover, a substantial question whether that would be a proper use of FMCSA's rulemaking authority under a statutory scheme that requires the agency to grant registration to all carriers that are willing and able to meet safety and financial responsibility requirements.

Respondents likewise did not raise this issue in their petition for judicial review, but rather adverted to it only in passing in a reply brief. See Pet. 21 & n.10. Respondents assert that the inclusion of the issue in a reply brief means that it was timely presented under Ninth Circuit precedent and, therefore, provides potential grounds for affirmance by this Court. Br. in Opp. 25 n.5. Respondents are mistaken. Ninth Circuit cases do not say that parties may raise new issues in their reply brief by calling them "rebuttal" (*ibid.*), but rather that the court may consider an appellant's arguments concerning issues *the appellee* injected into the case. See *United States* v. *Franco-Lopez*, 312 F.3d 984, 993 n.6 (9th Cir. 2002). Respondents do not identify anything in the government's appellate brief that raised, on their behalf, the alternative claim of agency error they seek to advance.

Because respondents' agency-discretion argument was not properly raised before FMCSA or in the court of appeals, it cannot support affirmance. See Pet. 21. Furthermore, even if this Court agreed with respondents' alternative ground and it became the basis for a remand order, the government would receive substantial relief from this Court because FMCSA's task on remand then would not include studying the environmental effects of the President's

border-opening decision, but instead would be limited to examining the environmental consequences of the relatively narrow range of safety-related options open to FMCSA in light of the President's decision to open the border. See *ibid.*

III. THE COURT OF APPEALS' CLEAN AIR ANALYSIS WAS INCORRECT

Respondents say little about the petition's showing (at 22-24) that the court of appeals also fundamentally misinterpreted the CAA's conformity-review requirement. Respondents do not attempt to argue that the President is a "department, agency, or instrumentality of the Federal Government," 42 U.S.C. 7506(c)(1), whose activities are potentially subject to the conformity-review obligation. See Br. in Opp. 26 n.8. Instead, tracking their NEPA argument, respondents contend (*id.* at 27) that FMCSA had to conduct a conformity review because "[FMCSA's] rules will result in Mexico-domiciled trucks traveling beyond the border commercial zones and emitting pollution."

The controlling regulations of the Environmental Protection Agency (EPA), as construed by the District of Columbia Circuit in upholding those regulations, see *Environmental Defense Fund, Inc.* v. *EPA*, 82 F.3d 451, 463-465 (per curiam), amended, 92 F.3d 1209 (D.C. Cir. 1996), compel the opposite conclusion. See Pet. 23-24. First, FMCSA cannot "practicably control" the additional emissions that supposedly will result from opening the border, as would be required for those emissions to be "indirect emissions" of the FMCSA rules (and thus subject to the conformity-review requirement). See Pet. 22-24; 40 C.F.R. 93.152 (definition of indirect emissions). FMCSA has no control over the President's decision to open the border to Mexican motor

carriers and no programmatic responsibility for emissions by those carriers. See Pet. 24.*

Second, FMCSA will not "maintain control over" emissions that result from opening the border, as EPA's "indirect emissions" definition also requires. 40 C.F.R. 93.152. FMCSA's role in this context is the essentially ministerial one of granting registration to any Mexican motor carrier that is "willing and able to comply with" applicable safety and financial-responsibility requirements. 49 U.S.C. 13902(a)(1). FMCSA's authorizing statute does not make it responsible for limiting carrier registration to accomplish environmental objectives, and FMCSA likewise is not responsible for opening or closing the border. For that additional reason, the conformity-review requirement does not apply to FMCSA's safety rules.

* * * * *

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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NOVEMBER 2003

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* The "practicabl[e] control" requirement is separate from, and in addition to, the "continuing program responsibility" requirement that respondents say (Br. in Opp. 27) is satisfied in this case. See *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,221 (1993) ("indirect emissions" are less-proximate emissions "that would be brought about by agency action, *and* that the agency can practicably control, *and* that are subject to a continuing program responsibility of th[e] agency") (emphasis added). Respondents, moreover, are incorrect when they argue (Br. in Opp. 27) that FMCSA has continuing program responsibility over the emissions of Mexican trucks and buses because those emissions are the "result" of FMCSA's rules. As explained in Point II.C, above, under the correct analysis the additional emissions that respondents contend will occur would result, not from FMCSA's safety rules, but from the President's decision to open the border to new Mexican motor carriers.

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JOINT APPENDIX
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-70986

PUBLIC CITIZEN; BROTHERHOOD OF TEAMSTERS; AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION; CALIFORNIA TRUCKING ASSOCIATION; ENVIRONMENTAL LAW FOUNDATION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS', PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL (NRDC) AND THE PLANNING AND CONSERVATION LEAGUE (PCL), PETITIONER-INTERVENORS

v.

DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; NICHOLAS R. WALSH, RESPONDENTS

DOCKET ENTRIES

DATE	PROCEEDINGS
5/2/02	FILED PETITION FOR REVIEW DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL, NOTIFIED RESPONDENTS OF FILING, SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT setting schedule as follows: petitioners' opening brief is due 7/22/02; respondents' brief is due 8/20/02; petitioner's optional reply brief is due 9/3/02. [02-70986] (vt) [02-70986]

DATE	PROCEEDINGS
5/2/02	Filed Petitioner Public Citizen, et al., emergency motion to stay and request for judicial notice in support w/declaration of Charles s. Crandall. served on 5/2/02 MOATT (vt) [02-70986]
5/2/02	Filed Jonathan Weissglass Civil Appeals Docketing Statement served on 5/2/02 (to CONFATT) [02-70986] [02-70986] (vt) [02-70986]
5/2/02	Received (oversized) ***FAXED*** Respondent Dept. of Transporta, Federal Motor, Nicholas R. Walsh's response in opposition to petr's emergency mtn under Cir. Rule 27-3; served on 5/2/02. (MOATT) [02-70986] (af) [02-70986]
5/2/02	Filed Original and 15 copies People of the State of CA ex rel. Atty General Bill Lockyer's amicus brief in support of petrs' petition for review and emergency mtn in 23 pages; served on 5/2/02. (MOATT) [02-70986] (af) [02-70986]
5/2/02	Filed Order (Harry PREGERSON, Ferdinand F. FERNANDEZ,) Petrs' emergency mtn under Cir. Rule 27-3 is DENIED. The briefing schedule established previously shall remain in effect. [02-70986] (af) [02-70986]

DATE	PROCEEDINGS
5/3/02	Received Petitioners' reply in support of emergency mtn; served on 5/2/02. (FYI/ MOATT) (faxed copy rec'd 5/2/02) [02-70986] (af) [02-70986]
5/6/02	Filed Petitioner International Brotherhood of Teamsters, CA Labor Federation, and Environmental Law Foundation EMERGENCY mtn under Cir. Rule 27-3 to expedite proceedings; declaration of Jonathan Weissglass; served on 5/6/02. (hand delivered to PROMO) [02-70986] (af) [02-70986]
5/8/02	Notice of appearance of John L.Smeltzer on behalf of Federal Motor Carrier Safety. [02-70986] (af) [02-70986]
5/9/02	Filed Respondent Federal Motor's response in opposition to petr's emergency mtn under Cir. Rule 27-3 to expedite proceedings; served on 5/8/02. (PROMO) (faxed copy rec'd 5/8/02) [02-70986] (af) [02-70986]
5/9/02	Filed Petitioner International B rotherhood of Teamsters, CA Labor Federation, and Environmental Law Foundation's reply in support of emergency mtn under Cir. Rule 27-3 to expedite proceedings; served on 5/9/02. (FYI/PROMO) [02-70986] (af) [02-70986]

DATE	PROCEEDINGS
5/9/02	Filed Order (Dep Clk: PROMO/tah) The ct is in receipt of the petrs' mtn to expedite the above captioned petition for review and the resps' response thereto. The mtn to expedite is GRANTED IN PART. The resp shall file the certified administrative record on or before 5/28/02. The opening brf is due 6/5/02. The ans brf is due 7/5/02. The optional reply brf is due 14 day from svc of the ans brf. No telephonic exts of time to file brfs prusuant to 9th Cir. Rule 31-2.2(a) shall be granted. Written mtns for ext. filed pursuant to 9th Cir. Rule 31-2.2(b) will not be granted absent a showing of extra-ordinary and compelling circumstatnces. This cs shall be placed on the next available calendar after the filing of the resps' ans brf. (c.c. Calendar Unit) [02-70986] (af) [02-70986]
5/22/02	Filed Order (Dep Clk: PROMO/cb) Petrs' opposed mtn to consolidated Nos. 02-70986 and 02-71249 is GRANTED. Petrs' opposed mtn to expedite is GRANTED IN PART. The following schedule shall govern both petitions. The records remain due 5/28/02; the opening brf(s) shall be due 6/19/02; the Govt's brf is due 7/19/02; the optional reply brf(s) shall be due 14 days from svc of the ans brf. The provisions of 9th Cir. Rule 31-2.2(a) shall not be applicable to these cases;

DATE	PROCEEDINGS
	any Rule 31-2.2(b) mtn is strongly disfavored. The provisions of 9th Cir. Rule 28-4 as they apply to continances are also inapplicable to these cases. Petrs are reminded of the ct's preference for joint brfs. (cite) The cases shall be placed on the next available calendar after the filing of the ans brf. Petrs are informed that the provisions of 9th Cir. Rule 27-3 are not intended for application to requests for procedural relief. (c.c. Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
5/28/02	Filed certified list in lieu of record on appeal; served on 05/24/02. (RECORDS) [02-71249, 02-70986] [02-71249, 02-70986] (dv) [02-70986 02-71249]
5/31/02	Filed Petitioner-Intervenor Natural Resources' motion for intervene on behalf of petrs; served on 5/31/02. (WIP/PROMO/tah) [02-70986, 02-71249] (af) [02-70986 02-71249]
6/7/02	Filed Federal Respondent's response to mtn to intervene as petrs' and mtn to recon ct's order dated 5/9/ and 5/22/02; served on 6/6/02. (WIP/PROMO-tah) [02-70986, 02-71249] (af) [02-70986 02-71249]
6/10/02	Filed Petitioners' response to resps' request to reconsider expedited proceedings; served on 6/10/02. (WIP/PROMO-tah) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
6/14/02	Filed Order (Appellate Commissioner) The mtn of the Natural Resources Defense Council and the Planning and Conservation League for leave to intervene on behalf of petrs is GRANTED. The response to the mtn to intervene includes a request for an order requiring petrs and intvns to file a joint brf. Resps' request is DENIED. However, the parties are reminded of the ct's strong preference for a joint brf. (cite) Resps are reminded that under 9th Cir. Rule 28-4, they may request an enlargement of brf size. Resps' request for recon of the provisions of 5/9/ and 5/22/02 orders regarding ext. of time is DENIED. (PROMO) [02-70986, 02-71249] (af) [02-70986 02-71249]
6/19/02	Filed original and 15 copies of Petitioners CONSOLIDATED opening brief (Informal: no) 52 pages and five excerpts of record in 2 volumes; served on 6/19/02. [02-70986, 02-71249] (af) [02-70986 02-71249]
6/25/02	Filed Original and 15 copies People of the State in 02-70986's brief of 31 pages; served on 6/24/02. [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *

DATE	PROCEEDINGS
7/15/02	Filed Mtn of Resps' and Order (Dep Clk: PROMO/tah) The federal resps' mtn for an enlargement of brf size for the ans brf is GRANTED. The movants may file an ans brf not to exceed 15,400 words. The briefing schedule is unchanged. This order was issued prior to the expiration of time within which a response may be filed. (cite) (Motion recvd 7/12/02)(phoned Atty Smeltzer for movant) [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *
7/22/02	Filed Original and 15 copies respondent Dept. of Transportation Federal Motor Carrier Safety Admin.'s 70 pages brief, 5 Sup Excerpts of Record in 1 vol; served on 7/19/02. [02-70986, 02-71249] (af) [02-70986 02-71249]
7/25/02	Received Amicus ATA Litigation in 02-70986, in 02-71249's brief in 15 copies of 30 pages; served on 7/24/02. (REFERRED TO MERITS PNL per 7/31/02 order) [02-70986, 02-71249] (af) [02-70986 02-71249]
7/25/02	Filed Amicus ATA Litigation's mtn for leave to file amicus curiae in support of resps; served on 7/24/02. (RECORDS FOR MERITS PNL per 7/31/02 order) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
7/31/02	Filed Order (Dep Clk: PROMO/cag) Ata Litigation Center, Inc.'s mtn for leave to file amicus curiae in spport of resps, the proposed brf and any related filing shall be REFERRED FOR DISPOSITION TO THE PNL that considers the merits of the cs. ANY FUTURE MTNS TO FILE A FRIEND OF THE CT BRF SHALL BE TREATED IN THE SAME FASHION. [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *
8/2/02	Filed Original and 15 copies of Petitioners' CONSOLIDATED reply brief (Informal: no) 34 pages; served on 8/2/02. (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/2/02	Filed Petitioners' mtn for leave to file evidence in support of standing; served on 8/2/02. (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/2/02	Received Petitioners' evidence in support of standing; served on 8/2/02. (mtn for leave to file pending) (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/2/02	Filed Petitioner-Intervenor Natural Resources' mtn for leave to file evidence in support of standing; served on 8/2/02. (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
8/6/02	Filed Petitioner-Intervenor Natural Resources' mtn to correct "Intervenor-Petrs' mtn for leave to file evidence in support of standing"; served on 8/6/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/7/02	CALENDARED: San Francisco October 8, 2002 9:00 a.m. Courtroom 2 [02-70986, 02-71249] (mw) [02-70986 02-71249]
8/19/02	Filed Petrs' International Brotherhood of Teamsters, CA Labor Federation, and Environmental Law Foundation's mtn for additional time for oral argument; served on 8/19/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/29/02	Filed Order (Dep Clk: DOCKETING/hh) Petrs' and Intervenors' Mtns for Leave to File Evidence in Support of Standing are hereby GRANTED. (served PANEL; phoned csls at 2:30 p.m.; c.c. Front Counters) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/29/02	Filed Petrs' evidence in support of standing; served on 8/2/02. (per 8/29/02 order) [02-70986, 02-71249] (af) [02-70986 02-71249]
9/4/02	Filed Amicus People of the State's mtn to present oral argument in supprt of petrs' petition for review and emergency mtn; served on 9/3/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
9/12/02	Received Adrianna Quintero Somaini for Petitioner-Intervenor Natural Resources' ltr dated 9/12/02 re: respectfully write to call to the attention of the pnl a rpt from the U.S. Environmental Protection Agency, entitled "FINAL HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST." . . . (faxed to PANEL) [02-70986, 02-71249] (dv) [02-70986 02-71249]
9/23/02	Filed order (Dep Clk/hh) The mtn for leave to file an amicus curiae brf by ATA Litigation Center, Inc. is GRANTED. Petrs' mtn for add'l time for oral argument is DENIED without prejudice. The mtn by the People of State of CA as amicus curiae for add'l time to present oral argument is DENIED; however, petrs may choose to allocate a portion of their time to the Atty General. (PHONED @1:20 pm) [4493704-1] [4509949-1] [4522553-1] [02-70986, 02-71249] (ea) [02-70986 02-71249]
9/23/02	Filed orig & 15 copies ATA Litigation's amicus curiae brf of 30 pgs; served on 7/24/02. (PREVIOUSLY REC'D) [02-70986, 02-71249] (ea) [02-70986 02-71249]

DATE	PROCEEDINGS
9/30/02	Received Petrs' additional citations in 02-70986, 02-71249; served on 9/30/02 (faxed to PANEL; hand delivered to S.F Chambers; c.c. ctrroom dep/tu) (Rec'd in docketing on 10/2/02) [02-70986, 02-71249] (af) [02-70986 02-71249]
10/8/02	ARGUED AND SUBMITTED TO Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW [02-70986, 02-71249] (tu) [02-70986 02-71249]
10/22/02	Received Petrs' additional citations, served on 10/22/02 (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/2/02	Received Petrs' additional citations, served on 12/1/02 (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/2/02	Filed Petitioners' EMERGENCY mtn for stay under Cir. R. 27-3 declaration of Jonathan Weissglass; served on 12/2/02. (faxed and Fedex to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/2/02	Filed Order (Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW) Resps shall file their opp, if any, to Petrs' emergency stay mtn by Wed, 12/4/02. Each side file a supp brf addressing the effect of the President's Memo of 11/27/02 modifying

DATE	PROCEEDINGS
	the Mexican-domiciled motor carrier moratorium, (cite), on the issues presented in this cs. Brfs must be filed on or before Fri, 12/13/02, and shall be no longer than 15 pgs in length. It is so ORDERED. (served PANEL; phoned and faxed to parties at 4:15 p.m.; c.c. Front Counter) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/3/02	Received notice of Intervenors' from Petitioner-Intervenor Natural Resources Defense Council and the Planning and Convervation League in 02-70986, in 02-71249 notice of joinder in petrs' emergency mtn for stay under Cir. R. 27.3; served on 12/3/02. (faxed to PANEL) (af) [02-70986 02-71249]
12/4/02	Filed Amicus People of the State in 02-70986, in 02-71249's brf in support of petrs' emergency mtn for stay; served on 12/4/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/4/02	Filed ****FAXED**** Respondents' response in opposition to petrs' mtn for an emergency stay under Cir. R. 27-3; served on 12/4/02. (faxed to PANEL) (hard copies rec'd 12/5/02) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
12/5/02	Filed Petrs' reply in support of mtn for stay; served on 12/5/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/6/02	Filed Order (Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW) Petrs' Emergency Mtn for Stay under Cir. R. 27-3 is taken under submission. Resps shall provide this Ct with immediate notice upon the occurrence of any of the following events: (1) the completion of the negotiations between Resps and the Mexican gov't on a Memo of Understanding to establi sh protocols for U.S. inspectors' operations in Mexico; (2) the scheduling of FMCSA's first safety audit of a Mexico-domiciled motor carrier; or (3) the publication of notice that any such carrier has successfully passed such as audit. To reiterate our order of 12/2/02, simultaneous sup briefing addressing the effect of the President's Memo of 11/27/02 modifying the Mexican-domiciled motor carrier moratorium, (cite), on the issues presented in this cs shall be filed on or before Friday, 12/13/02. It is so ORDERED. (served PANEL; phoned and faxed to csls at 4:00 p.m.; c.c. Front Counter and C. Catterson by hh) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
12/13/02	Filed ***FAXED*** Original and 0 copies Respondents' supplemental brief of 16 pages, served on 12/13/02. (total of 3543 words) (faxed to PANEL) (ORIGINAL and 15 Copies rec'd 12/16/02; PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/13/02	Filed Original and 15 copies Petitioners and Intervenors' JOINT Supplemental brf of 14 pgs pursuant to order of the ct; served 12/13/02. (faxed and served PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
1/13/03	Received Petrs' in 02-70986, in 02-71249 additional citations, served on 1/13/03. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
1/16/03	FILED OPINION: GRANTED AND REMANDED. (Terminated on the Merits after Oral Hearing; Granted and Remanded; Written, Signed, Published. Dorothy W. NELSON; Michael D. HAWKINS; Kim M. WARDLAW, author.) FILED AND ENTERED JUDGMENT. [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *
2/26/03	Filed Federal Motor in 02-70986, in 02-71249 motion for an ext. of time in which to seek rehearing or rehearing en banc; served on 2/24/03. (faxed to KMW) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
2/28/03	Filed Order (Kim M. WARDLAW,) Pursuant to Resps' mtn, the Ct grants Resp an additional seven days in which to file a petition for rehearing or rehearing en banc. Resps may file any such petitions on or before 3/10/03. NO FURTHER EXTS WILL BE GRANTED. It is so ordered. (served PANEL; phoned csls at 11:30a.m.; c.c. Front Counter) [02-70986, 02-71249] (af) [02-70986 02-71249]
3/10/03	Filed Original and 50 copies of Federal Resps' petition for panel rehearing and petition for rehearing en banc in 18 pgs; served on 3/10/03. (total of 4198 words) (PANEL and all active judges) [02-70986, 02-71249] (af) [02-70986 02-71249]
4/10/03	Filed Order (Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW) The pnl has voted unanimously to deny the petition for pnl rehearing. Judges Hawkins and Wardlaw have voted to deny the petition for en banc rehearing, and Judge Nelson has so recommended. The full ct has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (cite) The petition for rehearing and for rehearing en banc are DENIED. [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
4/18/03	MANDATE ISSUED. Costs taxed against respondents in the amount of $3370.80. [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-71249

INTERNATIONAL BROTHERHOOD OF TEAMSTERS; BROTHERHOOD OF TEAMSTERS, AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION; CALIFORNIA TRUCKING ASSOCIATION; ENVIRONMENTAL LAW FOUNDATION; PUBLIC CITIZEN, PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL (NRDC) AND THE PLANNING AND CONSERVATION LEAGUE (PCL), PETITIONER-INTERVENORS

v.

U. S. DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; JOSEPH M. CLAPP; NICHOLAS R. WALSH, RESPONDENTS

DOCKET ENTRIES

DATE	PROCEEDINGS
5/16/02	FILED PETITION FOR REV DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL, NOTIFIED RESPONDENTS OF FILING, SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT setting schedule as follows: petitioners'

DATE	PROCEEDINGS
	opening brief is due 8/5/02; respondents' brief is due 9/3/02; petitioners' optional reply brief is due 9/17/02. [02-71249] (tm) [02-71249]
5/16/02	Filed attorney for Petitioner Civil Appeals Docketing Statement served on 5/14/02 (to CONFATT) [02-71249] [02-71249] (tm) [02-71249]
5/16/02	Filed Petitioner Public Citizen's emergency motion to consolidate petitions for review; served on 05/16/02. (MOATT) [02-71249] [4433427] (govt telephonically informed court that opp will be filed) (dv) [02-71249]
5/20/02	Filed notice of appearance of Andrew C. Mergen and John L. Smeltzer (Withdrew as counsel: attorney Robert Plocki for DOT) [02-71249] (dv) [02-71249]
5/20/02	Filed Respondent DOT response opposing emergency motion to consolidate cases; served on 05/17/02. (MOATT) [4433427-1] [02-71249] (dv) [02-71249]
5/20/02	Filed Petitioner's reply to response in support of emergency motion to consolidate petitions for review and expedite proceedings; served on 05/20/02. (MOATT) [02-71249] (dv) [02-71249]

DATE	PROCEEDINGS
5/22/02	Filed Order (Dep Clk: PROMO/cb) Petrs' opposed mtn to consolidated Nos. 02-70986 and 02-71249 is GRANTED. Petrs' opposed mtn to expedite is GRANTED IN PART. The following schedule shall govern both petitions. The records remain due 5/28/02; the opening brf(s) shall be due 6/19/02; the Govt's brf is due 7/19/02; the optional reply brf(s) shall be due 14 days from svc of the ans brf. The provisions of 9th Cir. Rule 31-2.2(a) shall not be applicable to these cases; any Rule 31-2.2(b) mtn is strongly disfavored. The provisions of 9th Cir. Rule 28 -4 as they apply to continances are also inapplicable to these cases. Petrs are reminded of the ct's preference for joint brfs. (cite) The cases shall be placed on the next available calendar after the filing of the ans brf. Petrs are informed that the provisions of 9th Cir. Rule 27-3 are not intended for application to requests for proceduaral relief. (c.c. Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
5/28/02	Filed certified list in lieu of record on appeal; served on 05/24/02. (RECORDS) [02-71249, 02-70986] [02-71249, 02-70986] (dv) [02-70986 02-71249]

DATE	PROCEEDINGS
5/31/02	Filed Petitioner-Intervenor Natural Resources' motion for intervene on behalf of petrs; served on 5/31/02. (WIP/PROMO/tah) [02-70986, 02-71249] (af) [02-70986 02-71249]
6/7/02	Filed Federal Respondent's response to mtn to intervene as petrs' and mtn to recon ct's order dated 5/9/ and 5/22/02; served on 6/6/02. (WIP/PROMO-tah) [02-70986, 02-712 49] (af) [02-70986 02-71249]
6/10/02	Filed Petitioners' response to resps' request to reconsider expedited proceedings; served on 6/10/02. (WIP/PROMO-tah) [02-70986, 02-71249] (af) [02-70986 02-71249]
6/14/02	Filed Order (Appellate Commissioner) The mtn of the Natural Resources Defense Council and the Planning and Conservation League for leave to intervene on behalf of petrs is GRANTED. The response to the mtn to intervene includes a request for an order requiring petrs and intvns to file a joint brf. Resps' request is DENIED. However, the parties are reminded of the ct's strong preference for a joint brf. (cite) Resps are reminded that under 9th Cir. Rule 28-4, they may request an enlargement of brf size. Resps' request for recon of the provisions of 5/9/ and 5/22/02 orders regarding ext. of time is DENIED. (PROMO) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
6/19/02	Filed original and 15 copies of Petitioners' CONSOLIDATED opening brief (Informal: no) 52 pages and five excerpts of record in 2 volumes; served on 6/19/02. [02-70986, 02-71249] (af) [02-70986 02-71249]
6/25/02	Filed Original and 15 copies People of the State in 02-70986's brief of 31 pages; served on 6/24/02. [02-70986, 02-71249] (af) [02-70986 02-71249]
7/8/02	Received Respondent Dept. of Transportation 02-70986 letter dated 7/1/02 re: . . . This requests that you amend your svc lists. 1st, on Nos. 02-70986 and 02-71249 delete the Secretary and the Administrtor, Nat'l Highway Traffic Safety Admin. . . 2nd, on No. 02-70303 add, Ass. Chief Csl for litigation, Nat'l Highway Traffice Safety Admin, Rm 5219, Mail Code NCC-10, 400 7th St, SW, WA, DC 20590. [02-70986, 02-71249] (af) [02-70986 02-71249]
7/15/02	Filed Mtn of Resps' and Order (Dep Clk: PROMO/tah) The federal resps' mtn for an enlargement of brf size for the ans brf is GRANTED. The movants may file an ans brf not to exceed 15,400 words. The briefing schedule is unchanged. This order was issued prior to the expiration of time

DATE	PROCEEDINGS
	within which a response may be filed. (cite) (Motion recvd 7/12/02) (phoned Atty Smeltzer for movant) [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *
7/22/02	Filed Original and 15 copies respondent Dept. of Transportation Federal Motor Carrier Safety Admin.'s 70 pages brief, 5 Sup Excerpts of Record in 1 vol; served on 7/19/02. [02-70986, 02-71249] (af) [02-70986 02-71249]
7/25/02	Received Amicus ATA Litigation in 02-70986, in 02-71249's brief in 15 copies of 30 pages; served on 7/24/02. (REFERRED TO MERITS PNL per 7/31/02 order) [02-70986, 02-71249] (af) [02-70986 02-71249]
7/25/02	Filed Amicus ATA Litigation's mtn for leave to file amicus curiae in support of resps; served on 7/24/02. (RECORDS FOR MERITS PNL per 7/31/02 order) [02-70986, 02-71249] (af) [02-70986 02-71249]
7/31/02	Filed Order (Dep Clk: PROMO/cag) Ata Litigation Center, Inc.'s mtn for leave to file amicus curiae in spport of resps, the proposed brf and any related filing shall be REFERRED FOR DISPOSITION TO THE PNL that considers the merits of the cs.

DATE	PROCEEDINGS
	ANY FUTURE MTNS TO FILE A FRIEND OF THE CT BRF SHALL BE TREATED IN THE SAME FASHION. [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *
8/2/02	Filed Original and 15 copies of Petitioners' CONSOLIDATED reply brief (Informal: no) 34 pages; served on 8/2/02. (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/2/02	Filed Petitioners' mtn for leave to file evidence in support of standing; served on 8/2/02. (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/2/02	Received Petitioners' evidence in support of standing; served on 8/2/02. (mtn for leave to file pending) (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/2/02	Filed Petitioner-Intervenor Natural Resources' mtn for leave to file evidence in support of standing; served on 8/2/02. (Calendar Unit) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/6/02	Filed Petitioner-Intervenor Natural Resources' mtn to correct "Intervenor-Petrs' mtn for leave to file evidence in support of standing"; served on 8/6/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
8/7/02	CALENDARED: San Francisco October 8, 2002 9:00 a.m. Courtroom 2 [02-70986, 02-71249] (mw) [02-70986 02-71249]
8/19/02	Filed Petrs' International Brotherhood of Teamsters, CA Labor Federation, and Environmental Law Foundation's mtn for additional time for oral argument; served on 8/19/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/29/02	Filed Order (Dep Clk: DOCKETING/hh) Petrs' and Intervenors' Mtns for Leave to File Evidence in Support of Standing are hereby GRANTED. (served PANEL; phoned csls at 2:30 p.m.; c.c. Front Counters) [02-70986, 02-71249] (af) [02-70986 02-71249]
8/29/02	Filed Petrs' evidence in support of standing; served on 8/2/02. (per 8/29/02 order) [02-70986, 02-71249] (af) [02-70986 02-71249]
9/4/02	Filed Amicus People of the State's mtn to present oral argument in supprt of petrs' petition for review and emergency mtn; served on 9/3/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
9/12/02	Received Adrianna Quintero Somaini for Petitioner-Intervenor Natural Resources' ltr dated 9/12/02 re: respectfully write to call to the attention of the pnl a rpt from the

DATE	PROCEEDINGS
	U.S. Environmental Protection Agency, entitled "FINAL HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST." . . . (faxed to PANEL) [02-70986, 02-71249] (dv) [02-70986 02-71249]
9/23/02	Filed order (Dep Clk/hh) The mtn for leave to file an amicus curiae brf by ATA Litigation Center, Inc. is GRANTED. Petrs' mtn for add'l time for oral argument is DENIED without prejudice. The mtn by the People of State of CA as amicus curiae for add'l time to present oral argument is DENIED; however, petrs may choose to allocate a portion of their time to the Atty General. (PHONED @1:20 pm) [4493704-1] [4509949-1] [4522553-1] [02-70986, 02-71249] (ea) [02-70986 02-71249]
9/23/02	Filed orig & 15 copies ATA Litigation's amicus curiae brf of 30 pgs; served on 7/24/02. (PREVIOUSLY REC'D) [02-70986, 02-71249] (ea) [02-70986 02-71249]
9/30/02	Received Petrs' additional citations in 02-70986, 02-71249; served on 9/30/02 (faxed to PANEL; hand delivered to S.F Chambers; c.c. ctrroom dep/tu) (Rec'd in docketing on 10/2/02) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
10/8/02	ARGUED AND SUBMITTED TO Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW [02-70986, 02-71249] (tu) [02-70986 02-71249]
10/22/02	Received Petrs' additional citations, served on 10/22/02 (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/2/02	Received Petrs' additional citations, served on 12/1/02 (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/2/02	Filed Petitioners' EMERGENCY mtn for stay under Cir. R. 27-3 declaration of Jonathan Weissglass; served on 12/2/02 (faxed and Fedex to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/2/02	Filed Order (Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW) Resps shall file their opp, if any, to Petrs' emergency stay mtn by Wed, 12/4/02. Each side file a supp brf addressing the effect of the President's Memo of 11/27/02 modifying the Mexican-domiciled motor carrier moratorium, (cite), on the issues presented in this cs. Brfs must be filed on or before Fri, 12/13/02, and shall be no longer than 15 pgs in length. It is so ORDERED. (served PANEL; phoned and faxed to parties at 4:15p.m.; c.c. Front Counter) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
12/3/02	Received notice of Intervenors' from Petitioner-Intervenor Natural Resources Defense Council and the Planning and Convervation League in 02-70986, in 02-71249 notice of joinder in petrs' emergency mtn for stay under Cir. R. 27.3; served on 12/3/02. (faxed to PANEL) (af) [02-70986 02-71249]
12/4/02	Filed Amicus People of the State in 02-70986, in 02-71249's brf in support of petrs' emergency mtn for stay; served on 12/4/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/4/02	Filed ****FAXED**** Respondents' response in opposition to petrs' mtn for an emergency stay under Cir. R. 27-3; served on 12/4/02. (faxed to PANEL) (hard copies rec'd 12/5/02) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/5/02	Filed Petrs' reply in support of mtn for stay; served on 12/5/02. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/6/02	Filed Order (Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW) Petrs' Emergency Mtn for Stay under Cir. R. 27-3 is taken under submission. Resps shall provide this Ct with immediate notice upon

DATE	PROCEEDINGS
	the occurrence of any of the following events: (1) the completion of the negotiations between Resps and the Mexican gov't on a Memo of Understanding to establish protocols for U.S. inspectors' operations in Mexico; (2) the scheduling of FMCSA's first safety audit of a Mexico-domiciled motor carrier; or (3) the publication of notice that any such carrier has successfully passed such as audit. To reiterate our order of 12/2/02, simultaneous sup briefing addressing the effect of the President's Memo of 11/27/02 modifying the Mexican-domiciled motor carrier moratorium, (cite), on the issues presented in this cs shall be filed on or before Friday, 12/13/02. It is so ORDERED. (served PANEL; phoned and faxed to csls at 4:00p.m.; c.c. Front Counter and C. Catterson by hh) [02-70986, 02-71249] (af) [02-70986 02-71249]
12/13/02	Filed ***FAXED*** Original and 0 copies Respondents' supplemental brief of 16 pages, served on 12/13/02. (total of 3543 words) (faxed to PANEL) (ORIGINAL and 15 Copies rec'd 12/16/02; PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]

DATE	PROCEEDINGS
12/13/02	Filed Original and 15 copies Petitioners and Intervenors' JOINT Supplemental brf of 14 pgs pursuant to order of the ct; served 12/13/02. (faxed and served PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
1/13/03	Received Petrs' in 02-70986, in 02-71249 additional citations, served on 1/13/03. (faxed to PANEL) [02-70986, 02-71249] (af) [02-70986 02-71249]
1/16/03	FILED OPINION: GRANTED AND REMANDED. (Terminated on the Merits after Oral Hearing; Granted and Remanded; Written, Signed, Published. Dorothy W. NELSON; Michael D. HAWKINS; Kim M. WARDLAW, author.) FILED AND ENTERED JUDGMENT. [02-70986, 02-71249] (af) [02-70986 02-71249]
	* * * * *
2/26/03	Filed Federal Motor in 02-70986, in 02-71249 motion for an ext. of time in which to seek rehearing or rehearing en banc; served on 2/24/03. (faxed to KMW) [02-70986, 02-71249] (af) [02-70986 02-71249]
2/28/03	Filed Order (Kim M. WARDLAW,) Pursuant to Resps' mtn, the Ct grants Resp an additional seven days in which to file a petition for rehearing or rehearing en banc.

DATE	PROCEEDINGS
	Resps may file any such petitions on or before 3/10/03. NO FURTHER EXTS WILL BE GRANTED. It is so ordered. (served PANEL; phoned csls at 11:30a.m.; c.c. Front Counter) [02-70986, 02-71249] (af) [02-70986 02-71249]
3/10/03	Filed Original and 50 copies of Federal Resps' petition for panel rehearing and petition for rehearing en banc in 18 pgs; served on 3/10/03. (total of 4198 words) (PANEL and all active judges) [02-70986, 02-71249] (af) [02-70986 02-71249]
4/10/03	Filed Order (Dorothy W. NELSON, Michael D. HAWKINS, Kim M. WARDLAW,) The pnl has voted unanimously to deny the petition for pnl rehearing. Judges Hawkins and Wardlaw have voted to deny the petition for en banc rehearing, and Judge Nelson has so recommended. The full ct has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (cite) The petition for rehearing and for rehearing en banc are DENIED. [02-70986, 02-71249] (af) [02-70986 02-71249]
4/18/03	MANDATE ISSUED. Costs taxed against respondents in the amount of $3370.80. [02-70986, 02-71249] (af) [02-70986 02-71249]

* * * * *

Regulatory Analysis and Regulatory Flexibility Analysis

FMCSA-98-3297-[287]
FMCSA-98-3298-[260]
FMCSA-98-3299-[263]
FMCSA-01-10886-[2]
FMCSA-01-11060-[2]

Part 365, Part 368, and Part 385 Rules
Mexican Carrier Provisions

Federal Motor Carrier Safety Administration
December 2001

* * * * *

[4] Approximately 190 Mexican motor carriers currently have OP-1(MX) forms pending with the DOT.

Mexican carriers that operate within the U.S. municipalities and commercial zones along with the U.S.-Mexico border must file form OP-2. The current version of the OP-2 form asks detailed questions about the carrier's operations, location, and equipment, and the FMCSA estimates that it takes approximately two hours for a carrier to complete (OMB Approval No. 2126-0010). Approximately 10,100 active Mexican carriers currently have OP-2 authority. This does not mean that all these carriers are currently operating in the United States, just that they are legally able to do so.

The ICC also developed an OP-1(MX) form, for Mexican carriers to apply for authority to operate beyond the four border States. This form is similar to the OP-1 form long used by the former ICC for domestic for-hire carriers. While a number of Mexican carriers submitted these forms, they were not processed by the DOT, pending the outcome of the delay in implementing NATA. The OP-1(MX) is similar to the OP-2 form, and also takes two hours to complete (OMB Approval No. 2126-0016).

Even without the broader border opening envisioned by NAFTA, trade between the United States and Mexico has skyrocketed the last few years. Along with the growth in trade has come an increase in truck traffic crossing the broder. According to the Federal Reserve Board of Dallas, trade with Mexico reached $196.6 billion in 1999, up more than 141 percent from 1993 (Vargas). The growth in trade appears to have

accelerated in 2000, according to data from the Bureau of Economic Analysis reported by Economic Data Resources. Northbound truck crossings have grown almost 90 percent from fiscal year (FY) 1993 to FY 2000, rising from 2.4 million to 4.55 million crossings per year (Economic Data Resources, 2000).

The growth in trade and traffic has been accompanied by increasing concern about the safety of Mexican motor carriers operating in the United States. Several government reports indicate that many Mexican motor carriers are unlawfully operating outside the commercial zone, and that they have a higher out-of-service (OOS) rate than domestic carriers. The DOT's Office of the Inspector General (IG) issued a report in November 1999 detailing safety and operational problems with Mexican motors carriers and the Department's oversight of there carriers. The IG found that 41 percent of 23,300 Mexican vehicles inspected at the border or in the commercial zones in FY 1998 were placed OOS. The IG also estimated that approximately 130 Mexican motor carriers may be operating illegally outside the border States, and 505 in the border States but outside the commercial zones (Office of the Inspector General). The General Accounting Office (GAO) noted in 1997 that Mexican trucks inspected at the border had an average monthly OOS rate of 45 percent between January and December of 1996, compared to a 28 percent rate for domestic carriers during fiscal year 1995 (General Accounting Office).

* * * * *

FMCSA

FINDING OF NO SIGNIFICANT IMPACT

FOR

FMCSA-98-3297
FMCSA-98-3298
FMCSA-98-3299
FMCSA-01-10886
FMCSA-01-11060

Revision of Regulations and Application Form for Mexico-Domiciled Motor Carriers To Operate in United States Municipalities and Commercial Zones on the United States-Mexico Border

Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border

Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States

Parts and Accessories Necessary for Safe Operation; Certification of Compliance with Federal Motor Vehicle Safety Standards (FMVSSs)

These proposed actions have been thoroughly reviewed by the Federal Motor Carrier Safety Administration (FMCSA) and it has been determined, by the undersigned, that these proposed actions would have no significant effect on the human environment.

This finding of no significant impact (FONSI) is based on the attached FMCSA prepared Environmental Assessment (EA) which has been determined to adequately and accurately discuss the environmental is-

sues, impacts, and alternatives of the proposed actions, and provides sufficient evidence and analysis for determining that an environmental impact statement is not required. The EA is attached to this document and is hereby incorporated by reference in this FONSI.

[1-16-02] /s/ DALE M. JENNIFER, for
Date DALE M. JENNIFER
Charles Rombro, Environmental Project Manager, FMCSA

I have considered the information contained in the EA (and any other appropriate environmental documentation), which is the basis for this FONSI. Based on the information in the EA and this FONSI document, I agree that the proposed actions as described above, and in the EA, will have no significant impact on the environment.

[1-16-02] /s/ [ILLEGIBLE]
Date Joseph M. Clapp, Administrator

FMCSA ENVIRONMENTAL ASSESSMENT FOR

Revision of Regulations and Application Form for Mexico-Domiciled Motor Carriers To Operate in United States Municipalities and Commercial Zones on the United States-Mexico Border

Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border

Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States

Parts and Accessories Necessary for Safe Operation; Certification of Compliance with Federal Motor Vehicle Safety Standards (FMVSSs)

This Federal Motor Carrier Safety Administration's (FMCSA) environmental assessment (EA) was prepared in compliance with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321-4347, hereinafter "NEPA") and the regulations for implementing NEPA issued by the Council of Environmental Quality Regulations, November 29, 1978 (49 C.F.R. parts 150-1508), and in accordance with the Department of Transportation's (DOT) Order 5610.lC, Procedures for Considering Environmental Impacts, September 18, 1979, as amended July 3, 1982, and July 30, 1985.

This environmental assessment serves as a concise public document to briefly provide sufficient evidence and analysis for determining the need to prepare a finding of no significant impact or to assist the FMCSA in determining whether there is a need to prepare an environmental impact statement.

This environmental assessment concisely describes the proposed actions, the need for the proposal, identifies the alternatives, and determines which aspects of the proposed actions and alternatives have potential for social, economic, or environmental impact. This EA also contains a comparative analysis of the actions and alternatives, a statement of the environmental significance of the preferred alternative, and a list of the agencies and persons consulted during EA preparation.

1-16-02 [Illegible Signature]
Date Charles Rombro, Environmental Project Manager, FMCSA

1-16-02 [Illegible Signature]
Date Julie Anna Cirillo, Chief Safety Officer, FMCSA

In reaching my decision/recommendation on the FMCSA's proposed action, I have considered the information contained in this EA on the potential for environmental impacts.

1-16-02 [Illegible Signature]
Date Joseph M. Clapp, Administrator, FMCSA

[Seal Omitted]

US. Department of Transportation
Federal Motor Carrier Safety Administration

Safety Oversight for Mexico-Domiciled Commercial Motor Carriers

Final Programmatic Environmental Assessment
January 2002

Prepared by
John A. Volpe National Transportation Systems Center

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LIST OF ACRONYMS

CAA - Clean Air Act
CEQ - Council on Environmental Quality
CFR - Code of Federal Regulations
CMC - commercial motor carrier
CMV - commercial motor vehicle
CO - carbon monoxide
CVSA - Commercial Vehicle Safety Alliance
dB - decibels
DOT - Department of Transportation
EO - Executive order
EPA - Environmental Protection Agency
ESA - Endangered Species Act
FHWA - Federal Highway Administration
FMCSA - Federal Motor Carrier Safety Administration
FMVSS - Federal Motor Vehicle Safety Standards
GAO - General Accounting Office
GHG - greenhouse gases
ICC - Interstate Commerce Commission
NAAQS - National Ambient Air Quality Standards
NAFTA - North American Free Trade Agreement
NEPA - National Environmental Policy Act
NHPA - National Historic Preservation Act
NHTSA - National Highway Safety Administration
NO_2 - nitrogen dioxide
NO_x - nitrogen oxides
OIG - Office of Inspector General
OMCS - Office of Motor Carrier Safety
Pb - lead
PEA - Programmatic Environmental Assessment
PM - particulate matter
TNRCC - Texas Natural Resource Conservation Commission
USAF - United States Air Force
USC - United States Code

USFWS- Unites State Fish and Wildlife Service
VOC - volatile organic compounds
VMT - vehicle-miles of travel

1. PURPOSE AND NEED FOR ACTION

1.1. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)[1] and the Council on Environmental Quality's (CEQ) implementing regulations[2] establish policies and procedures that ensure environmental information is available to decision makers, regulatory agencies, and the public before Federal actions are implemented. The Federal Motor Carrier Safety Administration (FMCSA) with the cooperation of the John A. Volpe National Transportation Systems Center prepared this Programmatic Environmental Assessment (PEA) for the purpose of analyzing the potential environmental impacts associated with four proposed rulemakings. This PEA follows the procedures established by the United States Department of Transportation (DOT)[3] to implement NEPA, pursuant to the CEQ regulations.

The focus of this PEA concerns four proposed rulemakings that relate to the safety of Mexico-domiciled commercial motor carrier (CMC) operations in the United States. CMC include operators of trucks and buses. The first two of these rules would revise the application process for Mexico-domiciled CMC to improve FMCSA's ability to identify high-risk CMC and track CMC performance. The third rule would establish a safety monitoring system for Mexico-domiciled CMC that includes mandatory safety audits of CMC records and targeted roadside inspections of CMC commercial motor vehicles (CMV). (Refer to Appendix A for the

[1] 42 U.S.C. § 4321 et seq.

[2] 40 C.F.R. § 1500 et seq.

[3] DOT Order 5610.1C, Procedures for Considering Environmental Impacts, 9/18/79, as amended 7/13/82, 7/30/85.

definition of CMV.) The fourth rule would empower FMCSA to enforce the current National Highway Traffic Safety Administration (NHTSA) requirement that every CMV operated within the United States display a label certifying that it complies with all applicable Federal Motor Vehicle Safety Standards (FMVSS) in effect on the date of manufacture of the vehicle. These rules together form the Proposed Action of this PEA.

This PEA will focus only on the potential environmental impact and safety of operation implications of the proposed actions and alternatives based on: (1) the change in the number of Mexico-domiciled CMC receiving certificates of operating authority pursuant to the revised application forms (i.e., OP-2 and OP-1 (MX) Forms), and the associated change in the number of Mexican CMV operating in the United States; and (2) the change in the number, method, and frequency of inspections conducted on Mexican CMV operating in the United States. The purpose of this PEA is to assist FMCSA and the public in understanding the potential environmental consequences, if any, of the Proposed Action and alternatives. The PEA will be used by FMCSA to determine whether the proposed changes to the application process for Mexico-domiciled CMC and inspections system for Mexican CMV will result in significant environmental impacts. The PEA addresses the purpose and need for the Proposed Action, describes the Proposed Action and alternaives to the action, analyzes the potential environmental consequences of the proposed action and alternatives, and describes mitigation strategies and best management practices. This PEA is not intended to be a scientific document. Where appropriate, more detailed information and analysis is provided in one of the appendices to the PEA.

1.2. BACKGROUND

Prior to 1982, Mexico-domiciled CMC could apply for authority to operate within the United States by making an application for such authority to the former Interstate Commerce Commission (ICC). Under the Bus Regulatory Reform Act of 1982,[4] Congress imposed a two-year moratorium on the issuance of new certificates of United States operating authority to CMC domiciled in a contiguous foreign country, or owned or controlled by persons of a contiguous foreign country. The Act authorized the President to remove or modify the moratorium if the President determined that such action was in the national interest. The Act was developed in response to complaints that neither Mexico nor Canada were permitting United States CMC the same access to their markets as Mexican and Canadian CMC had to United States markets. Through the ICC Termination Act of 1995 (ICCTA), Congress, among other things, amended the President's authority under the 1982 Act by authorizing the President to remove or modify the moratorium upon the President's determination that such action is consistent with United States obligations under a trade agreement or with United States transportation policy.

While the trade issues with Canada were resolved quickly, resulting in the moratorium being modified for Canada-domiciled CMC, the trade issues with Mexico were not addressed until the North American Free

[4] Section 6 of Public Law No. 97-261, 96 Stat. 1102 (September 20, 1982), formerly codified at 49 U.S.C. § 10922(1), is now codified at 49 U.S.C. § 13902.

Trade Agreement (NAFTA) was negotiated in the early 1990s. Legislative and executive extensions have maintained the moratorium for most Mexico-domiciled CMC since 1982. However, the President has twice exercised his statutory authority and has modified the moratorium pursuant to the NAFTA. First, in 1994, the President modified the moratorium to allow certificates of authority for the operation in foreign commerce of Mexico-domiciled charter and tour buses throughout the United States. Second, in 2001, the President modified the moratorium to allow new certificates of authority for the operation of Mexican-owned or controlled, United States-domiciled CMC engaged in the transportation of passengers and of international cargo.

A number of Mexico-domiciled CMC have been permitted to operate in the United States because they are not covered by the moratorium. The moratorium only applies to certificates of new operating authority for operations beyond municipalities and commercial zones adjacent to Mexico in Texas, New Mexico, Arizona, and California (herein called the "border zone"). Thus, Mexico-domiciled carriers that intend to operate only within the border zone are not barred from receiving operating authority for operations in those areas, and Mexico-domiciled CMC that had obtained unrestricted operating authority before the moratorium was enacted may continue to operate throughout the United States. Additionally, the moratorium does not affect United States-owned, Mexico-domiciled private carriers, whose services are not for-hire, Mexico-domiciled CMC of certain commodities and Mexico-domiciled carriers that only traverse the United States to deliver or pick up cargo or passengers in Canada. Such carriers have never been restricted to the border zone.

The ICCTA also dissolved the ICC and transferred the authority to issue new certificates of United States operating authority for CMC and some other regulatory functions to the Office of Motor Carriers (OMC) of the Federal Highway Administration (FHWA). The Secretary of Transportation (the "Secretary") subsequently re-delegated the authority to carry out the duties and powers related to CMC safety outside of the FHWA to the Director, Office of Motor Carrier Safety (OMCS).[5] On December 9, 1999, the President signed the Motor Carrier Safety Improvement Act of 1999.[6] The new statute established the FMCSA within the Department of Transportation. Effective January 1, 2000, the Secretary rescinded the authority previously delegated to the former OMCS, and delegated this authority to FMCSA.[7]

The primary mission of the FMCSA is to reduce fatalities and injuries caused by CMV and to enforce hazardous materials regulations as they relate to CMC. The FMCSA works to ensure safety in CMC operations by developing and enforcing safety regulations, targeting high-risk carriers and CMV drivers, improving safety information systems and CMV technologies, strengthening CMV equipment and operating standards, and increasing safety awareness. To accomplish these activities, the FMCSA works with Federal, State, and local enforcement agencies, the CMC industry, organized labor, safety interest groups, and others.

The criteria that the FMCSA must apply when evaluating an application for operating authority in the United

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[5] 64 Fed. Reg. 58356, October 29, 1999.

[6] Public Law No. 106-159, 113 Stat. 1748 (December 9, 1999).

[7] 65 Fed. Reg. 220, January 4, 2000 (effective, January 1 , 2000).

States is statutory, and the FMCSA has no authority to deviate from, or add to, this criteria. Specifically, the statute requires the FMCSA to issue a certificate of operating authority to any person whom is deemed willing and able to comply with designated economic, safety, and financial responsibility requirements.[8] These specific requirements are either set forth in the statute or in regulations specifically authorized by the statute. Currently, the FMCSA must issue a certificate of operating authority to any United States or Canadian carrier submitting an application that indicates the carrier's willingness and ability to meet the above stated criteria. But for the moratorium, this would also be true as to Mexican applicants. The Secretary may not even consider complaints challenging a registration application unless the complaint concerns the applicant's willingness and ability to comply with the above three DOT regulatory requirements.[9] In the absence of such complaints, or other evidence regarding noncompliance with these requirements, the Secretary must grant the application. Consequently, the FMCSA is statutorily precluded from considering environmental issues in deciding whether to grant applications to provide CMC transportation in interstate or foreign commerce. Please refer to Appendix B for a list of selected government agencies with environmental and public health oversight and regulatory authority.

[8] 49 U.S.C. § 13902(a)(1).

[9] 49 U.S.C. § 13902(a)(4).

1.3. NEED FOR ACTION

Under the terms of the NAFTA, the United States, Mexico, and Canada agreed to remove certain existing barriers to the cross border operations of CMC (for more information on the environmental review of NAFTA, see references in Appendix F). The President and Congress committed the United States in the NAFTA to a timetable for modifying the moratorium that was to allow Mexico-domiciled CMC engaged in the transportation of international cargo to operate within the four Border States beginning in December 1995 and throughout the United States on January 1, 2000. Due to safety concerns, in December 1995, President Clinton indefinitely delayed the modification of the moratorium for Mexico-domiciled CMC. In February 2001, a NAFTA arbitral panel ruled that this action was contrary to the NAFTA. Under the NAFTA, this ruling meant that Mexico could impose trade sanctions against the United States unless the United States fulfilled its NAFTA obligations. Shortly after the panel issued its ruling, President Bush announced his intent to comply with the terms of the NAFTA in a manner consistent with safety by modifying the moratorium, pursuant to his statutory authority, once FMCSA was ready to issue its new regulations governing Mexico-domiciled CMC seeking United States operating authority. Once the moratorium is modified, the FMCSA must process Mexico-domiciled CMC applications for authority to operate throughout the United States.

If the moratorium is modified and the Proposed Action of issuing the four rules is not taken, the FMCSA would process applications currently on file from Mexican carriers seeking authority to operate beyond the border

zone applying the same criteria stated in the previous section above. These applications were submitted on an application form created by the ICC in a 1995 rulemaking. Until that form is substituted with a different form upon completion of these rulemakings, it remains the form that Mexico-domiciled CMC must use to request operating authority beyond the border zone.

In anticipation of the modification of the moratorium, the FMCSA is concerned that Mexico-domiciled CMC may have difficulty transitioning their operations to meet United States safety standards. To address this concern, FMCSA proposed to revise the application process and safety monitoring program currently in place for Mexico-domiciled CMC. These revisions would help FMCSA ensure that Mexico-domiciled CMC are willing and able to comply with all United States safety laws and regulations, prior to receiving a certificate of operating authority. In addition, the revisions will improve FMCSA' s ability to monitor Mexico-domiciled CMC operations in the United States. Specifically, the FMCSA proposes to modify the existing regulatory framework in two general areas:

- Applications by Mexico-domiciled CMC for authority to operate within the United States (both within and beyond the border zone), the first two rules; and

- FMCSA safety monitoring of Mexico-domiciled CMC (including new applicants) to ensure compliance with safety regulations, the third and fourth rules.

Both of these areas are currently governed by a regulatory scheme that is administered by the FMCSA. Under this current regulatory scheme, Mexico-

domiciled CMC seeking authority to operate within the border zone may apply for such authority using existing Form OP-2. Similarly, Mexico-domiciled CMC seeking authority to operate beyond the border zone may apply for such authority using the existing Form OP-1(MX) that was created by the ICC in 1995. Finally, all Mexico-domiciled CMC operating in any part of the United States are subject to the same inspection and review regime currently in place for United States and Canadian CMC (FMCSA 2001b).

1.4. SCOPE OF ANALYSIS

This PEA will analyze the potential environmental impacts associated with the current regulatory framework, and the four proposed rules that would modify this framework. Initially, this PEA will focus on the effect these alternatives will have on the number of Mexican CMV operating in the United States and the number of inspections that will be performed on these vehicles. Next, the PEA will describe the environment that may be impacted by changes in the total number of vehicles and inspections. Finally, the PEA will describe the potential environmental impacts associated with these changes on the following primary areas of potential concern: Transportation, Public Safety, Air Quality, Noise, and Socioeconomics.

1.5. GOVERNMENT-WIDE COORDINATION

Regulatory agency involvement is critical in the analysis of the proposed rulemakings, particularly with regard to NEPA. The FMCSA has coordinated the development and completion of this PEA to ensure participation and feedback from the Environmental Protection Agency and the Council on Environmental Quality.

2. PROPOSED ACTION AND ALTERNATIVES

2.1. OVERVIEW OF ALTERNATIVES

The purpose of this PEA is to assist FMCSA in understanding the potential environmental consequences of the Proposed Action and alternatives in order to determine whether they will result in significant environmental impacts. The analysis involves comparing each alternative to current environmental conditions to identify the resulting change. In most environmental reviews, the No Action Alternative provides a good description of the baseline, since it describes the current environmental conditions and the environmental consequences of maintaining the status quo. However, in the current situation, the anticipated Presidential order to modify the moratorium constitutes an intervening event that will modify the baseline conditions. Recognizing the influence of this intervening event, FMCSA has identified three probable scenarios that this PEA must consider. The Baseline Scenario consists of the continued use of existing FMCSA regulations with the Moratorium remaining unmodified. The second scenario is the No Action Alternative, whereby the use of the existing FMCSA regulations continues and the Presidential order to modify the Moratorium is implemented. The third scenario consists of the Proposed Action Alternative, whereby the four rules proposed by FMCSA are promulgated and the Presidential order to modify the Moratorium is implemented. Table 2-1 shows the requisite conditions that apply for the three scenarios considered in this PEA.

Table 2-1: Requisite Conditions for each Alternative

	Moratorium Unmodified	Moratorium Modified by Presidential order
No Change to Current FMCSA Regulations	Baseline	No Action
FMCSA Regulations Revised by Proposed Rules	N/A	Proposed Action

FMCSA also recognizes that there is a fourth scenario whereby the proposed rules are promulgated with the moratorium remaining in effect; however, this scenario has been dismissed from further analysis for several reasons. First, as stated in Section 1.3 describing the Need for Action, the President has announced his intent to comply with the terms of NAFTA. Second, although the President could modify the moratorium after the FMCSA completes this rulemaking, the period of time between the issuance of the final rules and the moratorium modification would be very short, and the rules relating to Mexican carrier operations beyond the border zone would, in any event, have no practical impact until the moratorium is modified. Third, the analysis of the other three scenarios will capture the moratorium's effect on the proposed rules, and any additional analysis of this scenario would thus be redundant.

Immediately prior to the completion of this PEA, the Congress passed the DOT Appropriations Act for FY 2002. The Act sets forth several conditions that must by met by the DOT before FMCSA may expend any FY 2002 appropriated funds to process Form OP-1 (MX) applications. Among the conditions set forth in

the Act are the requirements that FMCSA promulgate rules that implement the regulatory safety requirements contained in rules 2, 3 and 4 of the Proposed Action. This section of the Appropriations Act withholds funds for the processing of Form OP-1 (MX) until the satisfaction by DOT of the conditions set forth in the Act or upon the expiration of the appropriations period on September 30, 2002, whichever event occurs first. While the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect, since FMCSA would still be prohibited from processing OP-1 (MX) applications.

As a result, while the appropriations hold is in effect, the No Action Alternative against which the environmental impacts from the Proposed Action should be measured is identical to the Baseline scenario described in this document. Accordingly, to account for this additional scenario, our analysis of environmental impacts in Chapter 4 will compare the environmental impacts of the Proposed Action to the impacts associated with both the Baseline and No Action alternative. This dual analysis will allow the FMCSA to determine whether the Proposed Action will result in a significant impact to the environment as compared to a No Action Alternative with or without the appropriations hold in place.

To facilitate the environmental impact discussion in Chapter 4, this chapter describes each alternative and focuses on the operating conditions that will result from each alternative. The Proposed Action Alternative consists of four rules and is divided into two corresponding subsections to facilitate a separate review of each regulatory area addressed under the Proposed Action and described in Section 1.3 (see Table 2-2).

The first subsection addresses the application process for operating authority (rules 1 and 2, including a new pre-authority safety audit for those CMC operating pursuant to OP-1 (MX) authority). The second subsection addresses the safety monitoring program for Mexico-domiciled CMC operations (rules 3 and 4, including maintaining a current Commercial Vehicle Safety Alliance (CVSA) decal). Within each of these subsections, the PEA begins by describing the Baseline Scenario, followed by the No Action Alternative, and then the Proposed Action Alternative. Finally, since the Proposed Action is comprised of the implementation of the four rules, each resource analyzed in Chapter 4 concludes with a discussion of the total potential impact of the two regulatory sections together in a summary section.

Table 2-2: Proposed Action Alternative Contents

PROPOSED ACTION ALTERNATIVE	
Applications for Operating Authority	Rule 1 - Form OP-2 Revised
	Rule 2 - Form OP- 1 (MX) Revised, including a new pre-authority safety audit
Safety Monitoring Program for Mexico-Domiciled CMC *	Rule 3 - Proposed Safety Monitoring System Requirements
	Rule 4 - Proposed Certification Label Requirements (FMVSS)

* Also includes maintaining current CVSA decal

For the purposes of this analysis it was assumed that the implementation of the Proposed Action would not affect the trade volume between the United States, Mexico, and Canada, nor would it alter existing regula-

tions relating to the cargo or payloads carried by Mexico-domiciled CMC. Even though actual resulting trade conditions are at best difficult to quantify, it is expected that the Presidential order to modify the moratorium could result in changes in trade volume and operations between the United States and Mexico. As a result, there could be an increase in the number of Mexican CMV trips in the United States. The resulting increase would be determined by the difference between the new Mexican CMV trips and the offset resulting from the reduction in the number of United States CMV trips that would be replaced by their Mexican counterparts. However, this and any other associated effects in trade characteristics would be the result of the modification of the moratorium and not the implementation of the Proposed Action.

As a result, this PEA will focus only on the potential environmental impact and safety implications of the proposed actions and alternatives based on: (1) the change in the number of Mexico-domiciled CMC receiving certificates of operating authority pursuant to the revised application forms (i.e., OP-2 and OP-1 (MX) Forms), and the associated change in the number of Mexican CMV operating in the United States; and (2) the change in the number, method, and frequency of inspections conducted on Mexican CMV operating in the United States.

2.2. APPLICATIONS FOR OPERATING AUTHORITY

This section describes the operating conditions of Mexico-domiciled CMC within the United States, as the application process affects those conditions. This section begins by describing current operating conditions under the Baseline scenario, followed by a description

of how those conditions would change under the No Action and Proposed Action Alternatives.

2.2.1 Baseline Scenario — Moratorium Retained with Current Application Forms

Under current Baseline operating conditions, Mexico-domiciled CMC may apply for two different types of operating authority. The first is authority to operate within the commercial zone along the United States-Mexico border, known as the "border zone." Economic Commercial Zones are established geographical areas, as outlined or set forth in FMCSA regulations where interstate commerce is partially exempt from economic regulation.[10] The commercial zones exist throughout the United States and vary in size according to the population of the base municipality. Although commercial zone CMC are partially exempt from economic regulation they are still required to meet the same State safety standards that apply to other motor carriers. Most of the commercial zones are 20 miles wide or less, but the Rio Grande Valley zone, including four Texas counties, and the San Diego zones extend 70 miles wide. Mexican CMV operating within the United States commercial zone must obtain a certificate of registration from the FMCSA. In addition, approved Mexico-domiciled charter and tour bus companies can operate throughout the United States, but regular route operations are not allowed. Mexico-domiciled CMC may request border zone operating authority by submitting the application Form OP-2.

The second type of authority is required to operate throughout the United States, beyond the border zone. Mexico-domiciled CMC request this broader operating

[10] 49 C.F.R., Part 372, Subpart B.

authority by submitting the application Form OP-1 (MX). Under current Baseline conditions, with the moratorium in place, FMCSA is prevented from processing applications submitted on Form OP-1 (MX), in effect preventing Mexico-domiciled CMC from receiving authority to operate beyond the border zone.

Mexico-domiciled CMC may request an application form for operating authority from either an FMCSA division office or a border inspection station (Muñoz 2001). When a Form OP-2 application is submitted to FMCSA, the agency reviews the completed form and conducts a background check to determine whether the applicant carrier is willing and able to comply with all applicable DOT regulatory requirements. If the FMCSA finds that a carrier is willing and able to comply with the applicable laws and regulations, the carrier will receive a Certificate of Registration authorizing it to operate within the border zone. When a Form OP-1 (MX) application is received by FMCSA, the form is placed in a file to be processed when the moratorium is modified. There are approximately 200 Form OP-1 (MX) applications currently on file.

The FMCSA estimates that in 2001, there were 9,500 Mexico-domiciled CMC and 593,000 United States- and Canada-domiciled CMC with United States operating authority. These CMC operated approximately 4.5 million CMV in the United States, including approximately 63,000 Mexican CMV (FMCSA 2001d). The number of Mexico-domiciled CMC seeking operating authority in the United States border zone continues to increase every year, as shown in Table 2-3 (FMCSA 2001a). FMCSA has received approximately 1,300 new OP-2 applications per year over the past four years.

Table 2-3: New OP-2 Applications for Border Zone Operating Authority from Mexico-Domiciled CMC

Year	Number of Applications Received
1996	611
1997	1,223
1998	1,447
1999	1,377
2000	1,182

Source: FMCSA 2001a

Under a continuation of Baseline Scenario operating conditions, FMCSA expects to continue receiving and approving approximately 1,300 applications per year from Mexico-domiciled CMC seeking operating authority in the United States, resulting in 10,800 Mexico-domiciled CMC with operating authority in FY 2002. These carriers could operate approximately 71,500 CMV inside the United States, but would be largely confined to the border zone.

2.2.2 No Action — Moratorium Modified with Current Application Forms

Under the No Action Alternative, FMCSA would retain its current regulations after the Presidential order to modify the moratorium is issued. Under this alternative, Mexico-domiciled CMC would continue to apply for operating authority using either Form OP-2 or OP-1 (MX), and FMCSA would be under the obligation to process both application forms. The FMCSA would grant operating authority to a Mexico-domiciled CMC—to operate within or beyond the border zone —based upon a finding that the applicant carrier is willing and able to comply with applicable CMC safety regulations. Carriers operating under current certificates of authority would not be required to submit a

new application. In addition, once the Presidential order to modify the moratorium is implemented, NAFTA bus provisions would be in place, and Mexican bus companies would be able to apply for authority to carry passengers between Mexico and the United States over regular routes in scheduled operations. Also, Mexican bus companies may apply for authority to establish an enterprise in the United States to provide point-to-point passenger services (FMCSA 2001c). FMCSA expects that the economic opportunities created by the modification of the moratorium would result in a 9% annual increase in the number of new applications it would receive from Mexico-domiciled CMC, relative to the Baseline scenario.

Under the No Action Altemative, FMCSA expects half of the 9,500 Mexico-domiciled CMC currently operating within the border zone could apply for OP-1(MX) authority. In addition, FMCSA expects 1,500 new applications for operating authority could be received and approved by FMCSA in 2002, with approximately 75% of these carriers applying for OP-2 authority and the remaining 25% applying for OP-1 (MX) authority. Thus, the total number of Mexico-domiciled CMC operating pursuant to either type of authority in 2002 could be 11,000. These carriers could operate approximately 73,000 CMV, with 39,000 CMV operated pursuant to OP-2 authority and 34,000 CMV operated pursuant to OP-1 (MX) authority.

2.2.3 Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action, the FMCSA would promulgate two new rules. The first rule would amend 49 CFR parts 368 and 387 and revise Form OP-2, while

the second rule would amend 49 CFR part 365 and revise Form OP-l (MX) (see Appendix H for a copy of the revised OP-2 and OP-1 (MX) application forms). Under the amended regulations, all Mexico-domiciled CMC seeking authority to operate within the border zone would be required to submit the revised Form OP-2. CMC who already have a certificate of registration would have 18 months to submit a new OP-2 application form. Likewise, Mexico-domiciled CMC seeking authority to operate beyond the border zone, including carriers that previously filed pending Form OP-1 (MX) applications as well as carriers falling under one of the exceptions described in Chapter 1, would be required to submit the revised Form OP-1 (MX). All certificates of authority issued under either application form would be provisional for at least 18 months and until the Mexico-domiciled CMC completed a successful safety audit or compliance review, as outlined in Rule 3 (see the next Section, below). In addition, Mexico-domiciled CMC would be required to file a Motor Carrier Identification Report on a biannual basis, allowing the FMCSA to maintain current records concerning Mexico-domiciled CMC operations.

Under the second rule, all Mexico-domiciled CMC applying for authority to operate beyond the border zone using Form OP-l (MX) would be subject to a safety audit prior to receiving authority to operate in the United States. The safety audits required by this action would involve a review of the carrier's initial application for operating authority and a review of the carrier's records. An FMCSA safety auditor would evaluate the carrier's prior history of compliance with applicable CMC safety laws, as well as its ability to comply with these laws in the future. The safety audit

would be conducted either at the carrier's place of business or at an alternative location in the United States designated by the FMCSA. A satisfactory audit would be required before the carrier could receive authority to operate beyond the border zone.

Under both revised Forms OP-2 and OP-1 (MX), the FMCSA would collect more detailed information on an applicant CMC's size, operations, and history than can be collected using the current forms. The revised forms would require an applicant to affirm its basic knowledge of FMCSA regulations and indicate how it would comply with those regulations. The applicant would be required to certify that it has a system in place to ensure compliance with FMCSA safety requirements, identify contact names and provide additional information concerning driver qualifications, hours of service, drug and alcohol testing, vehicle conditions, accident monitoring, and hazardous material transportation. In addition, both forms would request information about the CMC' s insurance coverage. The carrier would be required to notify the FMCSA in writing of certain key changes in the information on either form within 45 days of the change. A failure to update the form could result in a suspension or revocation of the CMC's operating authority. The additional information required by both forms would allow the FMCSA to better determine the willingness and ability of Mexico-domiciled CMC to comply with Federal motor carrier safety regulations.

FMCSA expects that the economic opportunities created by the modification of the Moratorium would result in a 5% annual increase in the number of new applications it would receive from Mexico-domiciled CMC, relative to the Baseline scenario. Under the

Proposed Action Alternative, the increase in new applications would be less than under the No Action Alternative because the revised application form would deter applicants that would be unable to adequately demonstrate their willingness and ability to comply with the safety regulations.

Under the Proposed Action Alternative, half of the 9,500 Mexico-domiciled CMC currently operating within the Border Zone would apply for OP-1 (MX) authority. In addition, approximately 1,400 new applications for operating authority would be received and approved in 2002, with approximately 75% of these carriers applying for OP-2 authority and the remaining 25% applying for OP-1 (MX) authority. Thus, the total number of Mexico-domiciled CMC authorized to operate under either type of authority in 2002 would be approximately 10,900. These carriers would be authorized to operate approximately 72,000 CMV, with 38,000 CMV authorized pursuant to Form OP-2 and 34,000 CMV authorized pursuant to Form OP-l (MX).

FMCSA also expects that the pre-authority safety audits under Rule 2 would not affect the total number of Mexican CMV operating in the United States or the total amount of goods transported between Mexico and the United States. The FMCSA anticipates that some carriers would fail to pass the pre-authority safety audit and therefore be prevented from operating in the United States. However, since the Proposed Action would not affect total trade between the United States and Mexico, FMCSA expects that other carriers that succeed in passing the audit would replace any carriers that fail to pass the pre-authority safety audit.

2.3. SAFETY MONITORING FOR MEXICO-DOMICILED MOTOR CARRIERS

This section describes the operating conditions of Mexico-domiciled CMC within the United States, as those conditions are affected by the safety monitoring of Mexican CMC, CMV, and drivers. This section begins by describing the operating conditions as they are affected by the current baseline scenario, followed by a description of how those conditions would change under the No Action and Proposed Action Alternatives.

2.3.1 Baseline Scenario — Moratorium Retained with Current Safety Monitoring Program

Under current baseline operating conditions, the existing safety monitoring system for Mexican CMV is largely limited to monitoring border zone operations because, with the few exceptions listed in Chapter 1, Mexico-domiciled CMC are limited to conducting operations within the border zone. Currently, FMCSA conducts inspections on Mexico-domiciled CMC and CMV following the same guidelines applied for inspections of United States and Canadian CMV. In the United States inspections can take place at the border at designated roadside inspection stations, at a carrier's place of business, or at any point along the roadway. These inspections may occur at any time. (For more information on the inspection process, refer to Appendix A). All CMV operating in the United States are subject to inspections by Federal, State, or local authorities.

All CMV crossing the border from Mexico into the United States are required to pass through a United States Customs Service checkpoint, where some are selected for customs inspection. In Arizona, New

Mexico, and Texas, CMV may then be selected for a safety inspection by a Federal CMC safety inspector, who also works in the customs compound. Arizona, New Mexico, and Texas State inspectors may additionally inspect these trucks after they leave the compound. In California, the CMV leave the United States Customs compound and drive on a private road directly to the office of the California Highway Patrol where they are weighed by Weigh in Motion (WIM) scales. Certain vehicles passing over the WIM scales are then selected for a safety inspection, based in part on the inspecting official's determination that something on the vehicle raises a safety concern (Cisneros 2001a).

Currently, manufacturers of motor vehicles built for sale or use in the United States, as well as manufacturers of vehicles imported for use in the United States, must comply with the Federal Motor Vehicle Safety Standards (FMVSS) established by the National Highway Traffic Safety Administration (NHTSA) that were in effect at the time of their manufacture, and apply a FMVSS label to their vehicles attesting to their compliance.[11] In 1975, NHTSA issued an interpretive letter prohibiting the importation of vehicles without a certification label, including CMV used to transport passengers or cargo.[12] NHTSA subsequently included the FMVSS label requirements in its regulations, and all Mexico-domiciled CMC are required to comply with the NHTSA regulation by ensuring that their CMV bear the label while conducting operations in the United States.[13] Currently, FMCSA's own safety

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[11] 49 U.S.C., Section 30112.

[12] NHTSA interpretive letter to the Canadian Trucking Association, dated May 9, 1975.

[13] 49 C.F.R., Part 567.

regulations do not include the FMVSS label requirement and accordingly, FMCSA inspectors do not have authority to take enforcement action against Mexico-domiciled CMC found to be in violation of NHTSA's FMVSS label requirement (FMCSA 2001h).

In calendar year 2000, Federal and State authorities conducted 2.45 million CMV inspections, including 47,000 Mexican CMV inspections. This figure includes inspections that were conducted both within and outside the border zone. Previously, Federal and State authorities had conducted 2.36 million inspections in calendar year 1999 and 2.23 million inspections in calendar year 1998, reflecting an average annual increase of 110,000 inspections. During this same period, there were 27,000 inspections of Mexican CMV in 1998 and 42,000 inspections in 1999. This reflects an average annual increase of 10,000 Mexican CMV inspections.

FMCSA has received funding to hire and train more than 200 additional inspectors to work along the United States-Mexico border. These inspectors will be deployed regardless of whether the moratorium is modified or the proposed rules are implemented. These additional inspectors will perform approximately 100,000 inspections of Mexican CMV. Thus, under the Baseline scenario, FMCSA would expect approximately 2.77 million total CMV inspections in 2002 and 2.88 million inspections in 2003. Within this total, approximately 170,000 of the 2002 inspections and 180,000 of the 2003 inspections would be conducted on Mexican CMV.

2.3.2 No Action — Moratorium Modified with Current Safety Monitoring Program

Under the No Action Alternative, the FMCSA would retain its current inspection and review authority after the Presidential order to modify the moratorium is implemented. FMCSA expects that once the moratorium is modified, some Mexico-domiciled CMC would apply for and receive authority to operate beyond the border zone. As a result, some Mexican CMV would begin to transport goods to intermediate or final destinations throughout the United States, replacing the drayage operators and the United States CMV that previously transported these goods.

FMCSA would continue to conduct inspections on Mexico-domiciled CMC and CMV following the same guidelines applied for inspections of United States and Canadian CMV, whereby all CMV operating in the United States are subject to inspections by Federal, State, or local authorities at the border, at designated roadside inspection stations, at a carrier's place of business, and at any point along the roadway. These inspections may occur at any time. Since the modification of the moratorium could affect the total amount of freight transported between Mexico and the United States, the total number of CMV transporting those goods and the proportion of Mexican CMV operating in the United States may both increase slightly. As the total number of Mexican CMV subject to inspection increases, the number of those vehicles inspected may rise as well. In addition, FMCSA will continue to deploy additional inspectors at the border, as described under the Baseline scenario.

Under the No Action Alternative, FMCSA would expect the number of Mexican CMV inspections to

increase above normal trends by approximately 10%, resulting in approximately 180,000 Mexican inspections in 2002 and 190,000 inspections in 2003. It was conservatively assumed that there would be no replacement of inspections on United States and Canadian CMV as a result of the additional inspections of Mexican CMV. Thus, the total number of CMV inspections identified under the Baseline scenario would increase to approximately 2.78 million inspections in 2002 and 2.89 million inspections in 2003.

2.3.3 Proposed Action — Moratorium Modified with Revised Safety Monitoring System for Mexico-Domiciled CMC

Under the Proposed Action, FMCSA would promulgate two new rules. The first rule would amend 49 CFR, part 385 to establish a new Safety Monitoring Program for all Mexico-domiciled CMC operating within and beyond the border zone. The program would combine targeted roadside inspections with a system of safety audits to help ensure that Mexico-domiciled CMC are operated in compliance with all applicable safety regulations and conduct safe operations within the United States (FMCSA 2001e). The second rule would allow FMCSA to enforce the NHTSA requirement that all CMV operated in the United States display a certification label that acknowledges that the CMV complies with all FMVSS in effect on the date of manufacture.

Under the new Safety Monitoring Program, a Mexico-domiciled CMC that adequately demonstrates its willingness and ability to comply with applicable CMC safety regulations would be granted provisional operating authority for a minimum of 18-months, rather than the permanent authority granted under the Baseline and No Action Alternatives. The Mexico-domiciled

CMC would operate under provisional authority during this 18-month period while in the new safety monitoring system. While in the program, the carrier would remain subject to selective compliance reviews, as are United States-domiciled CMC. In addition, FMCSA will continue to deploy additional inspectors at the border, as described under the Baseline scenario.

The safety audits and compliance reviews conducted under the new Safety Monitoring Program would be similar to the pre-authority safety audits under Rule 2 described above, the revision of OP-1 (MX). However, the safety audits and compliance reviews conducted under Rule 3 would occur after the FMCSA grants operating status pursuant to either OP-2 or OP-1 (MX) authority and after Mexico-domiciled CMC commence operations in the United States. These audits would involve a review of the carrier's initial application and a review of the carrier's records. The safety auditor would evaluate the carrier's prior history of compliance with all applicable CMC safety provisions. The safety audit would be conducted either at the carrier's place of business or at an existing office building in the United States designated by the FMCSA. A satisfactory safety audit or compliance review would be required before a carrier could be released from the safety monitoring system at the end of the 18-month oversight period.

While operating under the safety monitoring system, a Mexico-domiciled CMC would also be subject to expedited action by the FMCSA if found to pose a potentially serious threat to the safety of the general public. If such a finding were made, FMCSA could either schedule an expedited safety audit or compliance review of the CMC or take other appropriate action.

Failure to respond appropriately or undergo the audit or review could result in the suspension of the carrier's registration. Examples of CMC activities that would lead to expedited action include, but are not limited to, the following activities:

- Using drivers that do not have or are operating without a valid Government of Mexico Commercial Driver's License (Licencia Federal de Conductor).
- Operating out-of-service vehicles without first making the required repairs.
- Being involved in, due to CMC act or omission, hazardous materials incidents within the United States.
- Using a driver who tests positive for drugs or alcohol or who refuses to submit to required drug or alcohol tests.
- Operating within the United States a vehicle that is not insured.
- Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period (FMCSA 2001f).

Under the Proposed Action Alternative, FMCSA would begin enforcing the NHTSA requirement that all CMV operating in the United States, including Mexican vehicles, bear a label certifying their compliance with the FMVSS on their date of manufacture. Mexican vehicle manufacturers have stated that Mexican CMV have been built to meet FMVSS standards since 1994 (FMCSA 2001k); however, applying a label to signify this is not required for sale in Mexico and has been

voluntary thus far. It is estimated that about 130,000 of the 400,000 trucks and buses that are operating on Mexican Federal roads were built after 1994 (FMCSA 2001h). FMCSA inspectors would check for the FMVSS label during their normal inspection process and would enforce violations of the requirement through a notice of violation and a fine. FMCSA expects that the enforcement of this existing NHTSA requirement would not affect total inspection numbers or substantially change inspection procedures. The only measurable change would be to increase the duration of inspections by approximately 5 seconds while inspectors verified the authenticity of a FMVSS label (FMCSA e-mail 2001).

FMCSA anticipates that manufacturers will retrofit labels for existing vehicles that are in compliance with the FMVSS regulations that existed at the time of manufacture. FMCSA expects many Mexican vehicles to already be in compliance with the FMVSS; however, a small portion of carriers may not be able to bring their vehicles into compliance. As a result, FMCSA expects that only a small number of Mexico-domiciled CMC will be compelled to reduce operations due to the implementation of this alternative. It is assumed that there will be no measurable effect from FMVSS labeling on the total number of Mexican CMV operating in the United States since those vehicles not bearing an FMVSS label will be replaced by vehicles that do bear an FMVSS label (FMCSA 2001h).

Under the Proposed Action Alternative, the trends in the total number of inspections that were identified under the No Action Alternative would continue. As a result, FMCSA expects there would be 180,000 Mexican inspections in 2002 and 190,000 inspections in

2003. The increase in Mexican vehicle inspections compared to the Baseline Scenario would increase the total number of CMV inspections to approximately 2.78 million inspections in 2002 and 2.89 million inspections in 2003.

Commercial Vehicle Safety Alliance Decal — Proposed Requirement:

Under this requirement, all Mexico-domiciled CMC granted provisional operating authority pursuant to a Form OP-1 (MX) application would be required to maintain a current Commercial Vehicle Safety Alliance (CVSA) decal on any of its CMV operated within the United States. In addition, CMC granted permanent OP-1 (MX) authority would be required to have a current CVSA decal on their CMV for three years after receiving permanent OP-1 (MX) authority. This requirement would supplement the new safety monitoring program requirements discussed in the Proposed Action above. Under this alternative, a CVSA decal would be affixed to each CMV that passed a Level I inspection. (Refer to Appendix A for more information on the criteria used to determine whether a vehicle has passed an inspection). Consistent with CVSA guidelines, a CVSA certified government employee who had successfully completed a CVSA approved training program would be authorized to conduct the inspection and affix the CVSA decal. The CVSA decal is valid for three consecutive months.

The FMCSA has determined that this alternative would require each Mexico-domiciled CMC conducting United States operations beyond the border zone to submit each of its CMV to a Level I inspection four times per year. In contrast, Mexican CMV would be inspected approximately 2 to 3 times per year under

the Baseline, No Action and Proposed Action Alternatives. These additional inspections would occur at existing inspection stations or other facilities where inspections currently take place. For the purposes of this PEA, we will assume that all of the inspections, and thus all of the impacts, will occur within the United States.

FMCSA estimates that the total number of Mexican CMV inspections would be 230,000 in 2002. The additional 50,000 inspections on Mexican CMV are necessary to meet the CVSA requirement of four yearly inspections for Mexican CMV operating pursuant to OP-l(MX) authority. (For more information, refer to Appendix A.) The calculation of the number of Mexican CMV inspections under the CVSA requirement was performed under the assumption that the average number of inspections per Mexican CMV operating pursuant to OP-2 authority would remain the same as those under the Baseline, No Action and Proposed Action Alternatives. Thus, the total number of CMV inspections would be approximately 2.83 million in 2002 and 2.99 million in 2003.

FMCSA expects that this requirement would not affect the total number of Mexican CMV operating in the United States or the total amount of goods transported between Mexico and the United States. The FMCSA anticipates that some Mexican vehicles would fail to meet the requirements for receiving a CVSA decal, requiring those vehicles to be placed out of service or denied entry into the United States. Vehicles places out of service in the United States must be repaired before continuing or returning to Mexico. However, since this alternative would not affect total trade between the United States and Mexico, FMCSA expects

that other vehicles that successfully obtain a CVSA decal would replace the Mexican CMV that fail to receive one.

3. AFFECTED ENVIRONMENT

The Alternatives considered in this document relate to the operation of Mexican CMV throughout the United States, including specific operations occurring within the United States-Mexico border zone. To assist the FMCSA in understanding the potential environmental impacts of these alternatives, this chapter describes the environmental resources of the United States particular to the Proposed Action, as well as the environmental resources that are specific to the border zone. The resources that may be affected by the alternatives are described as they exist today with the moratorium in place. A description of the regulatory framework is provided where relevant. In general, the transportation sector affects a range of environmental resources through the initial construction of roads, the improvement of these roads, and the operation of vehicles upon the roadways. No new roadways or facilities are being constructed for the Proposed Action so there will be no construction impacts from this action. Specifically, CMV can have impacts on these resources as the result of normal operations, inspections and crashes. In order to understand the scope of relevant resources that may be affected by the specific alternatives described in this PEA, descriptions of the United States highway transportation system and the resources of the United States and border zone are detailed.

3.1. DESCRIPTION OF UNITED STATES HIGHWAY TRANSPORTATION SYSTEM

This section describes the current state of the United States Highway Transportation System, including its layout, some programs that are in place to protect United States resources, and traffic volumes of CMV.

In this section only, CMV are defined as a single-unit, 2-axle, 6-tire or more truck, or a combination truck with either a single trailer or multiple trailers. CMV use the highways in the United States as a means to transport products throughout the country. The general highway corridors travel predominantly east-west or north-south and are broken down by rural and urban areas and then by the number of lanes for each roadway. In both rural and urban areas across the United States, more than half of all miles driven are on 2-lane roadways with the next largest number of miles traveled on four-lane highways. Most of these lanes are 12 feet wide.

On rural interstates, principal arterials, and minor arterials, CMV traffic comprises from 0.4 to 42 percent of all traffic volume, with an average volume of 14.9 percent. The majority of miles traveled in these rural areas are on roads with an average traffic volume of under 5,000 vehicles per day. Within three of the four border States, CMV traffic comprises more than the national average. Specifically, CMV traffic accounts for approximately 17 percent of all rural traffic in Arizona, New Mexico, and Texas, and approximately 14 percent of all rural traffic in California (OHPI 1996). On urban interstates, freeways and expressways, principal arterials, and minor arterials, CMV traffic comprises from 0.2 to 20.6 percent of all traffic volume with an average volume of 7.8 percent. The majority of miles traveled in these urban areas are on roads with an average traffic volume between 10,000 and 20,000 vehicles per day. Only one of the four border States experiences CMV traffic volume above the national average for urban areas. Specifically, CMV traffic accounts for approximately 12 percent of all urban traffic in Arizona, 7

percent in California and Texas, and 6 percent in New Mexico (OHPI 1996).

Highway corridors traverse through some protected resources areas such as national and state parks, wetlands and waterways, and nature preserves. Guadalupe Mountains National Park in Texas has route 62/180 running through it, while routes 118 and 385 travel through Big Bend National Park in Texas. White Sands National Monument in New Mexico has route 70 running through it, while route 85 travels through Organ Pipe Cactus National Monument in Arizona. Amistad National Recreation Area on the Texas/Mexico border has route 90 passing directly through it. Wetlands such as those in South Carolina, and agricultural resources such as those in Nebraska also have highways passing through them. The FHWA runs the Federal Lands Highway Program roads that serves both tourism and recreational travel, protects and enhances the natural resources in these lands, provides sustained economic development in rural areas, and provides Native Americans with needed transportation access (FHWA 2001).

The FHWA administers a coordinated Federal lands program consisting of forest highways, public land highways, park roads and parkways, refuge roads, and Indian reservation roads. This program funds more than 90,000 miles of federally-owned and public authority-owned roads, which serve Federal lands. They work with many different agencies such as the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Department of Defense, Federal Aviation Administration, Federal Railroad Administration, Federal Transit Administration, Military Traffic Management Command, National Park Service, State and

Local Governments, United States Amy Corps of Engineers, United States Fish and Wildlife Service, and United States Forest Service, to help with the preservation of the land and its resources while at the same time, providing roadways for both personal travel and the transportation of goods across the United States (FHWA 2001).

3.2. DESCRIPTION OF UNITED STATES AND BORDER ZONE RESOURCES

While the proposed actions have national scope, many of the potential impacts could be focused in the border zone. Thus, it is important to look at both the resources of the entire United States as well as the border zone resources in this Chapter. The Southwest region encompassing the border zone is the primary area potentially impacted by the Proposed Action. The border region, defined as a 100-kilometer band on both sides of the border, encompasses four United States States and six Mexico States, with approximately 6.2 million people in the United States and 4.3 million people in Mexico. Both general and border zone resources that could be affected by the proposed actions are described below. Primary resources that have the potential to be directly impacted are transportation, public health and safety, air quality, noise, and socioeconomics. The alternatives examined in this environmental assessment relate directly to the aforementioned resources and will be assessed in detail in Chapter 4. It is recognized that impacts to these primary resources may result in secondary impacts to other resources, such as, hazardous materials, solid waste, topography and geology, biological resources, invasive species, endangered species, water resources, cultural, 4(f) and farmland resources,

and visual resources. Therefore, these resources are discussed in this Chapter.

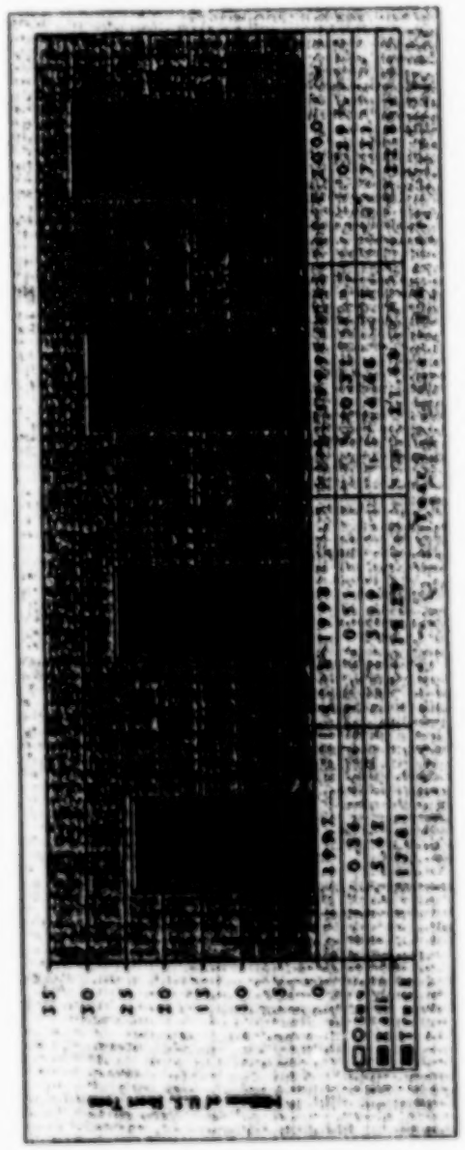
3.2.1 Transportation

United States Resources

The United States transportation system carries over 4 trillion passenger miles and 3.7 trillion ton-miles of freight every year, generated by more than 260 million people and 6 million businesses. Medium- and heavy-duty vehicles play a large role in moving consumer and commercial goods throughout the United States, using the highway infrastructure. Details of the highway system have been discussed Section 3.1.

The United States economy encompasses several regional economies with major links to international markets. CMC transport freight both within the United States and throughout North America. Between 1997 and 2000, annual imports from Mexico, by weight, increased from 23.99 million to 30.40 million United States Short Tons. This represents an average annual growth rate of approximately 9 percent. Over the past 4 years, CMV have carried approximately 75 percent of all imports from Mexico, as measured by weight (see Figure 3-1). The efficient transport of freight is essential to the economic prosperity of the nation, since the national economy is highly evolved and no one region is independent of the goods and services provided by other regions and external trade. The transportation of these goods is highly dependent on CMC and other freight transporters. As a result, between 1975 and 1998, annual vehicle miles traveled (VMT) by CMV in the United States more than doubled—from 81 billion VMT to 196 billion VMT (DOT 2001).

Figure 3-1: Mexico Imports into the United States between 1997 and 2000, as Measured by Weight (United States Short Tons)



Source: United States Customs Service

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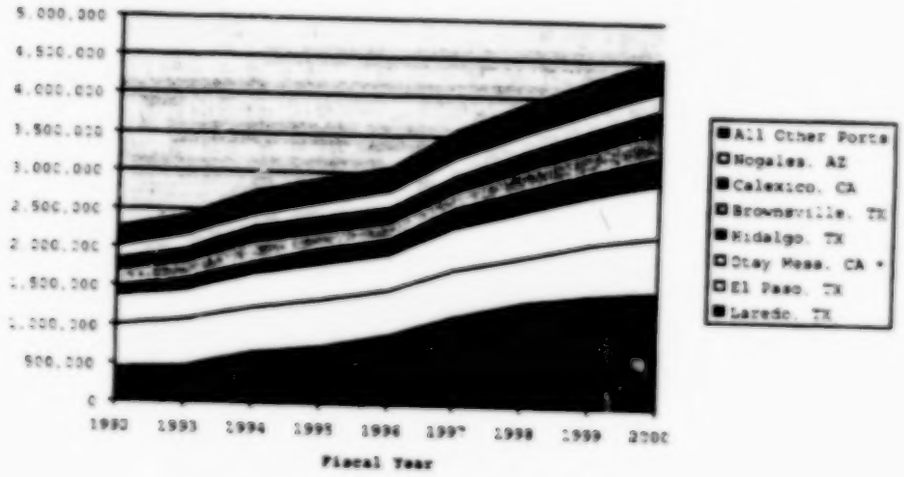
Border Zone Resources

Increases in trade between the United States and Mexico have generated a significant increase in cross border traffic in recent years (see Figure 3-2). This additional traffic has placed a strain on the local and regional transportation infrastructure and created congestion at border crossings. The dramatic growth in population along the border spurred by a significant increase in industrialization in the region has also contributed to the increased traffic. Another reason for delays and congestion is the inadequacy and poor condition of roads connecting the ports of entry (DOT 2001). This congestion can create a public safety hazard for local traffic and pedestrians, as well as increase pollution in border towns and cities. Additionally, delays due to congestion to and from ports of entry can have a potential impact on firms that rely on supplies and finished goods being shipped and processed quickly across the border.

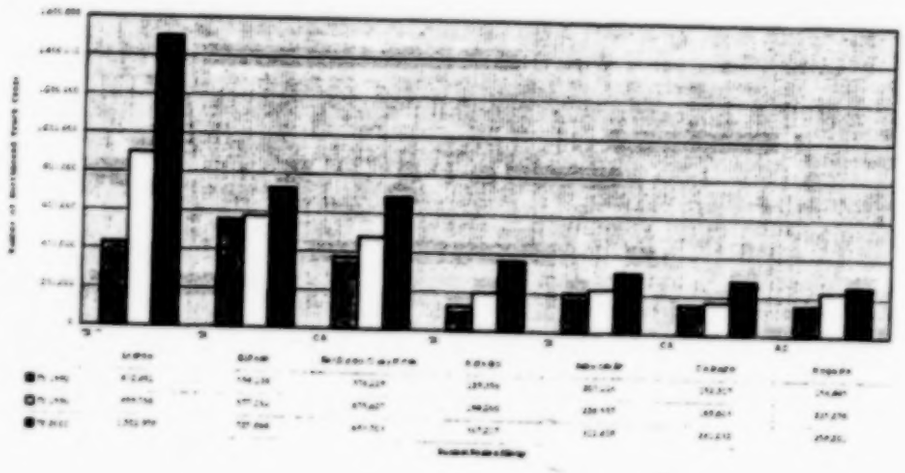
Figure 3-2: Trend in the Total Number of Northbound Truck Crossings into the United States from Mexico between FY 1992 and 2000.



Source: United States Customs Service

The growth in cross border trade between the United States and Mexico has been led by the maquiladora, or export assembly industry. Products from maquiladoras as well as fresh produce arrive at the border through five major Mexico highways. While some ports of entry process a high volume of commercial traffic, others are underutilized. According to United States Customs, approximately 91 percent of the all CMV crossing into the United States from Mexico between fiscal years 1992 and 2000 took place at seven of the 23 ports of entry that handle commercial traffic. During this period, the average annual growth rate in the number of northbound crossings was approximately 9 percent. The top seven ports of entry based on traffic volume are Laredo, Otay Mesa, El Paso, Brownsville, Hidalgo, Nogales, and Calexico (several of these ports have more than one bridge or crossing) (see Figure 3-3). At some ports of entry, such as the Juarez-Lincoln Bridge in Laredo, Texas and Otay Mesa, Califomia, there were as many as 2,500 commercial vehicle crossings during one day in 1998 (GAO 2000). Two-thirds of the total northbound CMV traffic crosses through three communities: Laredo and El Paso, Texas, and San Diego, California (See Table G-2) (GAO 2000).

Figure 3-3: Change in Northbound Truck Crossings at the Seven Busiest Ports of Entry for FY 1992, 1996 and 2000.



Source: United States Customs Service

There are several issues affecting United States-Mexico border crossing inspections that result in increased congestion (GAO 2000). Increased CMV traffic and associated congestion at some border crossings that were built in downtown areas, such as, Laredo and El Paso, Texas, have taxed border community infrastructure. Lines of trucks, many of which are empty, waiting to enter the United States from Mexico can run up to several miles during peak time-periods in the early to late afternoon. These idling trucks contribute to air pollution and safety concerns in some major border zone cities. At the same time, crossings in remote and less accessible areas along the border zone, such as,

and less accessible areas along the border zone, such as, Sasabe, Arizona or Roma, Texas, are underutilized and less congested. According to United States Customs records, nearly 47 percent of the 3.6 million trailers that crossed the border in fiscal year 1998 from Mexico were empty. United States Customs officials at the ports of entry must still process all trucks, empty or not, to ensure compliance with United States laws and regulations (GAO 2000).

Commercial traffic congestion at the United States-Mexico border is primarily caused by the high volume of vehicles at ports of entry that must be processed through facilities that have physical and technological limitations and comprehensive Federal and State processes. The specific factors that contribute to border congestion include: difficulties resulting from multiple checks at the border by various Federal and State agencies; inspection agency staffing shortages at some border crossings; limited use of automated management information systems for processing commercial traffic; poor port of entry planning among United States inspection agencies and limited coordination between United States and Mexico governments; and the number of inspections that a single CMV can be subject to (e.g., some CMV undergo up to six separate secondary inspections after inspection by United States Customs) (GAO 2000). There are approximately two hundred sites where certified inspection stations exist throughout the Border States.

3.2.2 Public Health and Safety

United States Resources

The primary mission of the FMCSA is to save lives and reduce injuries by preventing truck and bus crashes. The FMCSA establishes standards for CMC operations,

vehicles, and drivers to ensure the safety of the public on the United States roadways. The agency enforces both safety and hazardous material standards and monitors CMC operations that may affect the safety of workers. FMCSA programs ensure safety in CMC operations by targeting high-risk carriers and CMV drivers, improving safety information systems and CMV technologies, strengthening CMV equipment and operating standards, and increasing safety awareness.

The FMCSA works closely with Federal, State, and local enforcement agencies, the CMC industry, labor safety interest groups, and others to accomplish their safety goals. Crashes involving CMV are the largest safety concern in the CMC industry. In the United States in 1999, there were approximately 100,000 fatal and injury crashes involving heavy trucks—including 4,560 fatal crashes and 95,000 injury crashes. Approximately 800, or 18 percent of these fatal crashes occurred in Arizona, California, New Mexico, and Texas (US DOT 2001).

Between 1975 and 1998, annual VMT for large trucks in the United States more than doubled—from 81 billion VMT to 196 billion VMT. Despite this increase in large truck VMT, both the fatality rate and total crash incident rate per 100 million VMT have decreased. In 1998, there were 2.3 large truck crash fatalities for every 100 million VMT, down from 3.5 fatalities in 1988. The total number of fatalities, however, increased over the same period. In 1999, there were 5,380 fatalities in crashes involving large trucks, compared to 4,483 in 1975. On average, more than 80 percent of those killed in large truck crashes were non-motorists or occupants of other vehicles involved in the crash (US DOT 2001).

Enhanced alertness and work readiness are important requirements for CMV drivers. FMCSA's Motor Carrier Research and Technology Program aims to improve CMC safety and economic performance through research in the following areas: Driver Safety Performance, Commercial Safety Performance, Carrier Compliance and Safety, Safety Systems and Technologies, and Cross-Cutting Safety Initiatives. Specific project levels include such areas as crash causation and profiling, regulatory evaluation and reform, compliance and enforcement, hazardous materials safety and cargo tank integrity, commercial driver training and performance management, driver alertness and fatigue, driver physical qualification, and car-truck proximity (United States DOT 2001).

The Intelligent Vehicle Initiative portion of the Intelligent Transportation Systems Program aims to accelerate the development and commercialization of in-vehicle safety systems, such as, collision avoidance and driver condition monitoring. These complement other elements of the ITS Program, such as electronic clearance, onboard safety monitoring systems, automated administrative processes, and hazardous materials incident response. While the ITS Program addresses all highway vehicles, the safety implications for CMV are important since significant losses can result from crashes involving these vehicles (United States DOT 2001).

Although highway crash fatality rates have declined, new strategies are continually being developed to provide further reductions. The centerpiece of the FMCSA's Commercial Motor Vehicle Safety Action Plan is to reduce fatalities involving trucks and buses by half by 2010. While crashes involving CMV are frequently found not to be the fault of the operator of

the truck, advanced technological systems installed in CMV, together with carefully targeted investments, will continue to reduce CMV-related fatalities. One of the major challenges likely to be faced in the near term will not be technology advances—such as crash avoidance systems, early hazard detection, countermeasures for driver fatigue, and roadside brake examination on moving CMV—but adoption and implementation of these new technologies in the CMV industry to improve safety. Among the longer range solutions are crashworthiness requirements to reduce fatalities in truck/car collisions (United States DOT 2001).

United States DOT's technical goal for CMV is to reduce both the likelihood and severity of crashes involving CMV. Particular goals related to CMV crash avoidance include safer retreaded tires, better traction control and stopping capabilities, capabilities such as detecting and responding to driver fatigue, avoiding collisions involving "blind spots" and other situations involving car/CMV proximity and possibly supplementing brakes during emergency deceleration events. Goals related to severity of crashes involving CMV include better tank integrity, particularly for hazardous materials, as well as greater crash compatibility with light vehicles. United States DOT plans to refine technical goals for CMV on an on-going basis through the investigation of crashes nationwide, particularly those that may be related to emerging trends or technologies (United States DOT 2001).

One method of measuring the safety of trucking operations in the United States is by analyzing the frequency with which carriers' vehicles are placed out-of-service by safety inspectors due to the discovery of a serious safety defect. Reports by the United States Depart-

ment of Transportation's Office of the Inspector General (OIG 1999) have indicated that the rate at which Mexican CMV have been placed out of service has fallen over the past few years from 44 percent in FY 1997 to 37 percent in FY 2000. The OIG also noted that the out-of-service rate for United States CMV inspected nationwide in FY 2000 was 24 percent. This data indicates that while the overall level of safety of all Mexican CMV may be improving, the safety of United States CMV may still be better when compared an average of both drayage and long-haul Mexican CMV. However, as will be discussed in the Border Zone Resources section below, the out-of-service rate for the Mexican long-haul fleet is 19 percent, making it comparable to that of the United States long-haul fleet.

Border Zone Resources

Public safety issues are also a concern in the border zone since all Mexican CMV either operate in, or pass through, the border zone while operating in the United States. Increased traffic concerns in the border zone relate to the need for appropriate measures to safeguard public health and safety. Two of the Border States—Arizona and New Mexico—report a larger percentage of CMV crashes involving fatalities than the United States as a whole, whereas California and Texas remained below the United States national average.

Ports of entry are expected to be the places most affected by an increase in trade. Some resulting traffic safety concerns include the high congestion in the area and the lack of emergency lanes. According to a 1993 report by the University of Texas at El Paso, crash rates and fatality rates in the Texas border counties were noticeably higher than those rates compiled for the entire State of Texas. This implies traffic and

safety problems are more abundant at the border than throughout the rest of the State (Pezo, R. and Cook, G. 1993).

In May 2001, the OIG published a Interim Report on the Status of Implementing the North America Free Trade Agreement's Cross Border Trucking Provisions detailing its recent audit of DOT's oversight of Mexico-domiciled CMC. As a part of this audit, the OIG analyzed Federal and State inspection data maintained by the DOT for FY 1998. This data revealed that some Mexico-domiciled CMC had been subjected to a safety inspection beyond the border zone, in many cases while operating beyond the scope of their Form OP-2 authority. The OIG looked specifically at the number of Mexican CMV inspected in each of three areas: within the border zone, within the Border States but beyond the border zone, and beyond the Border States. In addition, the OIG reported the number of times that vehicles were placed out-of-service after an inspector identified a serious safety violation. This OIG report indicated that, the out-of-service rate for Mexican CMV inspected within the border zone was 41%, within the border states but beyond the border zone was 32% and beyond the border states was 19%.

3.2.3 Air Quality

United States Resources

Air quality is technically defined as the concentration of air pollutants present within the air mass of a region and is measured in parts per million (ppm) or micrograms per cubic meter (mg/m^3). Air pollutants are a significant cause for concern for both public health and welfare. Public health refers to the physiological effect on a human being while public welfare refers to such concerns as property damage and aesthetic effects. In

response to both of these concerns, Federal regulations have been developed for six criteria pollutants identified by EPA. These pollutants are considered harmful to public health and the environment. The six criteria pollutants that EPA established under the National Ambient Air Quality Standards (NAAQS) are carbon monoxide (CO), lead (Pb), nitrogen dioxide (NO_2), ozone (O_3), sulfur dioxide (SO_2), and particulate matter (PM). Nitrogen dioxide reacts in the atmosphere over the course of several hours and is often referred to simply as nitrogen oxides or NO_x.

In measuring air quality, the ambient concentration of pollutants is compared with the EPA's NAAQS. Table C-1 in Appendix C shows the primary and secondary standards used to regulate air pollution in the United States. If the concentration of any of these pollutants is less than or equal to their NAAQS standard, the air quality is considered in attainment of the standards. However, if the concentrations are greater than the NAAQS standard, the air quality for a region is considered to be in non-attainment of the NAAQS. Non-attainment areas are regions where the air pollution levels persistently exceed national air quality standards established by the Clean Air Act of 1967.[14] The EPA is continuously monitoring ambient air quality within counties and air basins in the United States. A detailed description of the criteria pollutants and their sources, current status and potential health effects is presented in Appendix C and Table C-2.

As shown in Table C-3 in Appendix C, mobile sources in the United States produce the highest or the second highest levels of emissions for several pollutants. The

[14] 42 U.S.C. § 112.

transportation sector continues to be a significant source of air pollutants at the national level. The table shows that motorized vehicles are responsible for most of the total CO (77.1 percent) and NO_x (55.5 percent) emissions in the United States. Close to half (47.0 percent) of the total VOCs (volatile organic compounds) and a quarter of total PM emissions are also due to motor vehicles. The contributions of Pb and SO_x from vehicles are relatively less, partly due to their reduced presence in transportation fuels (Pb has essentially been eliminated from gasoline). This table clearly indicates that the transportation sector is a significant source of pollutant emissions in the United States. Table C-4 shows the actual emissions from on-road vehicles separated into categories. The values reveal that although light-duty gasoline vehicles are generally the most significant source of pollution, heavy-duty gasoline and diesel vehicles are also significant. Indeed, for NO_x emissions, diesel vehicles are the most significant category. Heavy-duty diesel vehicles as a whole produce far more NO_x and PM emissions than light-duty vehicles. This is due to greater mass emissions from heavy-duty diesel vehicles that have only been regulated in the last decade (EPA 2001).

Total United States Emissions and Concentration Trends

Since 1970, the transportation sector as a whole has made tremendous progress in reducing emissions of criteria and hazardous air pollutants. Transportation related emissions of some pollutants, such as carbon monoxide (CO) and unburned hydrocarbons (HC), have been reduced by more than half since the 1970s (DOT 2001). However, heavy-duty surface vehicles, including CMV, have not made as rapid overall progress as cars

and light trucks. PM emissions from diesel engines are still great despite recent attempts to regulate the engines. Greenhouse gas (GHG) emissions from the transportation sector have continued to grow rapidly, with the transportation sector currently accounting for about a quarter of United States GHG emissions (DOT 2001). Consistent with recent economic growth, GHG emissions from CMC have been growing very quickly. Medium-and heavy-duty trucks contribute significantly to urban air pollution.

For the 1989-1998 period, most of the criteria pollutants experienced significant decreases in both emissions and atmospheric concentrations in the United States. Table C-5 shows that with the exception of NO_x, emissions and atmospheric concentrations for all of the criteria pollutants decreased during the study period. It should be noted that CO emissions decreased even though total VMT increased by 57 percent during this period. The decrease in Pb levels is the result of the effects of legislation that eliminated Pb from gasoline and limited its usage in industrial applications. Almost no change occurred for NO_2 emissions while concentration levels decreased. VOC emissions decreased while O_3 concentrations decreased slightly. 0_3 levels (concentrations) for urban and suburban areas decreased more than those in rural areas. Likewise, decreases in PM_{10} concentrations are also supplemented with the findings that urban and suburban areas experienced higher concentration levels. With most of the emissions occurring near power plants, including coal-burning plants, the emissions and concentration levels for SO_2 both decreased during the study period. These decreases are generally attributed to SO_2

controls that EPA implemented as part of their Acid Rain Program in 1995 (EPA 2001).

Mobile Sources

Mobile sources are generally classified under two broad categories: on-road and off-road. As their names imply, on-road vehicles are primarily used on paved roads while off-road vehicles include those used for construction, farming, lawn and garden, and airport services. The on-road engines can be further categorized into light-duty vehicles and heavy-duty vehicles with the weight difference changing at approximately 8,500 lbs gross vehicle weight (GVW) (National Research Council 2000). The light-duty category includes both passenger vehicles and light-duty trucks. Heavy-duty vehicles include both trucks and buses and are further categorized into gasoline and diesel-powered vehicles (light-duty vehicles are primarily fueled by gasoline). Table C-6 shows estimated pollutant emissions due to these different fuel types. The emission estimates were calculated using EPA's MOBILE5 and PART5 models. In general, using gasoline appears to produce more emissions of CO, NO_x, and VOCs while burning diesel appears to produce more NO_x and PM emissions. The contributions from diesel emissions of NO_x and SO_2 are significant compared to those for light-duty gasoline vehicles. Unlike light-duty vehicles, heavy-duty vehicles cover a much broader GVW range. Heavy-duty vehicle engines are certified on a special dynamometer since truck and bus engines can be placed in many different types of chassis and weight classes. Urban buses have their own emission certification standards. Until recently emissions standards for heavy-duty vehicles were less stringent than those for light-duty vehicles.

CMV are not presently required to participate in an Emissions Inspection and Maintenance Program, similar to that which is required for cars under 8,500 lbs. GVW. This is because there has been little research into Emissions Testing of CMV due to the high cost of chassis dynamometers. The University of West Virginia has conducted some chassis emissions testing of urban buses in New York City powered by diesel, natural gas, and hybrid electric, but more research is required. Some states have random roadside inspections to check for the opacity or smoke levels of CMV. Opacity/smoke testing is also in its initial stages and requires more work.

The factors that affect emissions from vehicles include: engine design and operating features; driver operating and maintenance practices; fuel composition; add-on pollution control technology; and environmental conditions (Cooper 1994). Engine design and operating features include air-to-fuel ratio or stoichiometry, compression ratio, and timing of the spark relative to the stroke of the piston. Driver operations are also important factors since no matter how well an engine is designed, it must be operated properly: the vehicle should not be overloaded, proper fuels should be used, and the vehicle must be maintained. Fuel composition is important because impurities in the fuel will be emitted into the environment. Sulfur is commonly used as an example of an impurity that directly forms $S0_2$. Add-on pollution control technology affects emissions after the pollutants have been formed. The technology emission controls such as the catalytic converter, refueling vapor canisters, positive crankcase ventilation and exhaust gas recirculation among others.

In many areas, transportation planning is subjected to the conformity process. States that fail to meet EPA standards for criteria pollutants must develop State Implementation Plans (SIPs) detailing how they will reach these standards. Transportation emissions must remain within levels projected by State Implementation Plans that, when implemented will lead to attainment of air quality standards. Transportation plans and programs, therefore, must conform to air quality goals. Neither the transportation conformity nor general conformity rules apply to the Proposed Action. Transportation plans, programs and projects in non-attainment and maintenance areas that are funded or approved by the FHWA and the Federal Transit Administration must meet the requirements of EPA's transportation conformity provisions.[15] Since these FMCSA actions do not involve such approvals or funds, they are not subject to the provisions of the transportation conformity rule.[16]

Border Zone Resources

In considering air pollution from CMV, NO_x and PM- 10 are the pollutants of main concern, because of the significant contribution of CMV to national emissions for these two pollutants, compared to the contribution of CMV to national emissions for the other criteria pollutants described above and in Appendix C. NO_x is predominantly created by high-compression internal combustion engines, and is a precursor to ozone (the main component of smog). On the other hand, PM-10 is produced in the fine soot particles that are emitted by diesel engines (ICF, 2001). Therefore, these are the

[15] Titles 23 and 49, U.S.C.

[16] 40 C.F.R., parts 51 and 93.

primary pollutants of concern that are dispelled from heavy-duty trucks and buses.

Among the seven counties containing the busiest border crossings with Mexico, Santa Cruz County in Arizona, and Cameron, Hidalgo, and Webb Counties in Texas, are considered "in attainment" for both PM-10 and ozone (see Table 3-1). EPA classified El Paso, Texas as a Moderate PM-10 non-attainment area and a serious ozone non-attainment area. San Diego, California is in attainment of the NAAQS for PM-10 but is classified by EPA as serious non-attainment for ground level ozone. Imperial County, California is a Moderate PM-10 non-attainment area and is no longer classified as a non-attainment area for ozone, but it is in a Maintenance status for the ozone standard.

Table 3-1: NAAQS Attainment Status for United States - Mexico Border Counties

COUNTY	PM-10	OZONE
San Diego, CA	In Attainment	Serious Non-Attainment
Imperial, CA	Moderate Non- Attainment	In Attainment*
Santa, Cruz, AZ	In Attainment	In Attainment
Cameron, TX	In Attainment	In Attainment
Hidalgo, TX	In Attainment	In Attainment
Webb, TX	Moderate Non-Attainment	Serious Non-Attainment
El Paso, TX	Moderate Non-Attainment	Serious Non-Attainment

* Currently in a Maintenance status under Section 185A of the Clear Air Act

Source: EPA 2001

In the highway corridor from San Antonio, Texas to Monterrey, Mexico, 84% of NO_x and 90% of the other pollutants are caused by trucking freight. This corridor

contains the Laredo border crossing, and is in Webb County, Texas. Also in this same region, it was discovered that 6.3% of trade-related CO emissions is due to truck idling. Another corridor where comparable air quality measurements were conducted is the highway that spans Tucson, AZ to Hermosillo, Mexico (ICF 2001). This corridor passes through the border city of Nogales, AZ in Santa Cruz County. While Santa Cruz County, AZ is in attainment for PM-10 and ozone, at the city level, Nogales, is in non-attainment status for PM-10 under the United States EPA standards (ICF, 2001).

3.2.4 Noise

Sound, an element of all human and natural environments, becomes noise when it is unwanted, unnecessary, or does not convey useful information. Noise is further defined as sound that disrupts normal activities or that diminishes the quality of the surrounding environment.

Generally, sound is measured in decibels (dB), which is a logarithmic scale that condenses the large range of sounds that make up the range of human hearing. Using this scale, an increase of 3 dB represents a doubling of sound energy, but this difference is barely detectable by the human ear. An increase in sound energy by 10 dB is approximately equivalent to a doubling in perceived loudness (USAF 1978). An "A-weighted" scale, termed dBA, places more emphasis on some frequencies while de-emphasizing others because the human hearing range is more sensitive to certain frequencies.

Acceptable noise levels for residential areas, as stated by the United States Department of Housing and

Urban Development guidelines, are 65 dBA during the day and 55 dBA at night. For perspective, 55 dBA is the approximate sound level of a quiet conversation at a distance of about 10 feet. Sixty-five dBA is typical of what might be heard in a large, fairly busy store, from a vacuum cleaner at 10 feet, or from heavy truck-dominated highway traffic at about 250 feet. Ambient noise levels in specific communities or locations will vary depending on certain variables, including the amount of development in an area and the population density of an area. For example, rural settings are typically about 40-48 dBA, while downtown urban settings are typically about 72-80 dBA. Sensitive receptors, such as residential areas, schools, hospitals, churches or any facility requiring mostly quiet conditions, can be affected by noise. Similarly, noise levels also affect workers in workplaces where noise can affect performance or cause hearing damage, and noise-sensitive wildlife species.

An important characteristic of sound is that its energy levels decrease as distance from the sound source increase. Typically, doubling the distance between a sound source and sound receiver results in four times less sound energy at the receiver than at the source. The noise attenuation of a line-source of noise, such as a highway, is less than that of a point source, such as a piece of machinery. This attenuation occurs because (1) a sound wave spreads out as it leaves its origin, which results in a more diffuse wave at the receiver and (2) the atmosphere absorbs some of the sound energy as the wave passes through it. Other factors can also influence this attenuation, including wind, temperature, humidity, terrain, and infrastructure (USAF 1978).

The transportation sector continues to generate considerable noise pollution. Achieving DOT's environmental goals will entail reducing the number of people exposed to significant transportation-related noise, including that from CMV. Although changes in design and operation of transportation facilities is a primary strategy, reduced noise emissions from vehicles such as trucks and buses will contribute significantly toward this objective (United States DOT 2001).

3.2.5 Socioeconomics

United States Resources

Socioeconomics includes the social and economic portion of the human environment and includes information on the demographics (population and employment), income and housing of the major geographic regions throughout the United States. External events, such as changes in public policy, have the potential to directly or indirectly affect these different areas of the human environment. Social consequences, such as adverse health effects from poor air quality conditions, have an effect on the quality of life enjoyed by residents in a community. Economic consequences, such as increases in health care costs, have an effect on business activities, market structure, and circulation of goods within and between communities. Size, distribution, and composition of a community's population will be affected by demographic consequences, such as out-migration of firms and labor due to increased business costs.

A community is defined partly by behavior patterns, which individuals or groups of individuals have in common. Daily social interactions, use of local facilities, participation in local organizations, and involvement in activities that satisfy the population's economic and social needs are ways of expressing these "community"

behavior patterns (FHWA 1996). In order to measure how well a community supports its demands, the response to changing environmental, social, economic, and demographic conditions must be examined. The Bureau of the Census provides information on demographics, income, public finances and local housing availability.

Border Zone Resources

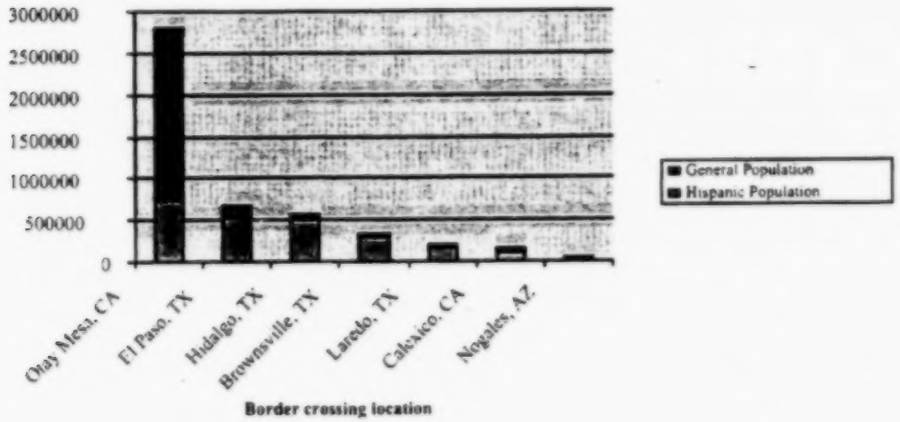
On February 11, 1994, the President issued Executive Order (EO) 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The Presidential Transmittal Memorandum that accompanies EO 12898 states that, "Each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by NEPA."[17] In order to identify any potential impacts on environmental justice and thereby comply with this Presidential order, this PEA identifies socioeconomic characteristics within the border zone.

According to 2000 census data, 4.8 million people live in the seven counties adjacent to the busiest border crossings, with over half of those people living in San Diego County adjacent to the Otay Mesa crossing. Of the people living adjacent to these seven crossings, 50% identified themselves as being of Hispanic or Latino origin (83% if San Diego County is excluded) (see Figure 3-4). San Diego County had a median household income of $39,427 and the remaining counties had median household incomes that ranged from $20,034 to $26,515 (see Figure 3-5). During the same period, the

[17] 42 U.S.C. Section 43321, et seq.

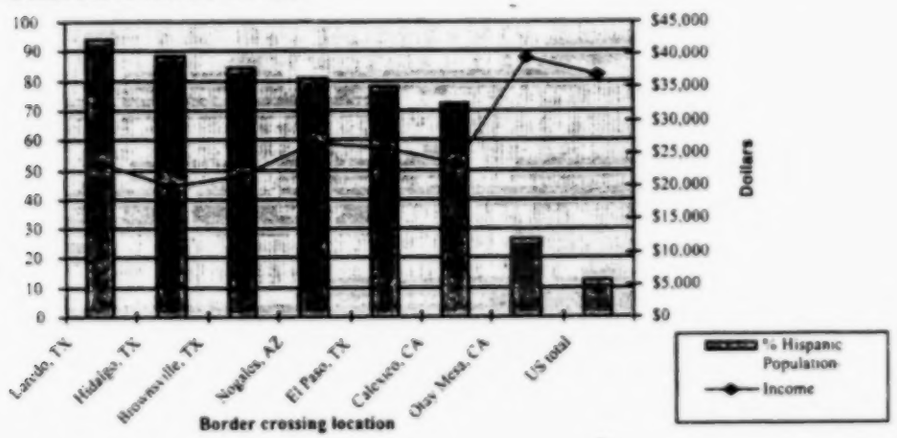
total United States population was 281.4 million with 12.5% identifying themselves as being of Hispanic or Latino origin. The median household income throughout the United States was $37,005. Six of the border counties have a median household income under 72% of the national average. In addition, one county has a Hispanic/Latino population that is twice the proportion of the national average, while the remaining six counties have Hispanic/Latino populations that are 5.5 to 7.5 times the national average (United States Census Bureau 2001).

Figure 3-4. General population versus Hispanic Population in border crossing cities.



Source: United States Census 2001

Figure 3-5. Percent Hispanic Population compared to average income for border crossing cities and the United States total.



Source: United States Census 2001

In addition to Hispanic and Latino communities within the border region, there are also many Native American groups that live within the Border States. Among these are Piman, Yuman, Dene, Shoshonean, and Pueblo peoples.

3.2.6 Other resources

The remaining potential areas of concern: Topography and Geology, Biological Resources, Hazardous Materials, Solid Wastes, Water Resources, Cultural, 4(f), and Farmland Resources, Visual Resources, Endangered Species, and Invasive Species are dismissed from further analysis. These areas of potential concern were dismissed after considering any potential impacts and—depending on the specific resource—based on a resource consumption analysis developed that provided basis for findings of minimal potential impacts. These calculations are found in Appendix D. In addition to the minimal resource consumption, the determination to drop these resources was based on the fact that the administrative, audit, and roadside inspections will occur at existing facilities thus causing no new construction, and FMCSA does not expect an increase in the total number of CMV operating in the United States. Based on these assumptions, FMCSA has concluded that there will be no more than insignificant impacts and minimum increases in resource consumption and waste disposal. All of the areas of potential concern were analyzed individually and the reasons for dropping these resources from further environmental analysis are explained briefly below and in Appendix D.

Hazardous Materials

Hazardous substances and wastes are solid, liquid or gaseous materials that because of their quantity, con-

centration or physical, chemical or infectious characteristics may:

- Cause or significantly contribute to an increase in mortality or an increase in irreversible illness, and
- Pose a substantial present or potential hazard to human health, or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.[18]

Hazardous materials are designated by the Secretary of the Department of Transportation as posing an unreasonable risk to health, safety, property and environment. Hazardous materials include hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, and materials identified by the DOT in the Code of Federal Regulations.[19] Those hazardous materials that are specifically regulated by the DOT are Class 1 Explosives, Class 2 Gases, Class 3 Flammable Liquids, Class 4 Flammable Solids, Class 5 Oxidizing Substances; Organic Peroxides, Class 6 Poisonous (Toxic) and Infectious Substances, Class 7 Radioactive Material, Class 8 Corrosives, and Class 9 Miscellaneous Dangerous Goods.

Carriers must register with the DOT to transport hazardous materials. Under existing regulations, hazardous materials must be properly classed, described, packaged, marked, labeled, placarded and in condition for shipment as required or authorized. Transporters of hazardous waste must meet strict guidelines, must

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[18] Resource Conservation and Recovery Act of 1976 (RCRA) codified at 42 U.S.C. §§ 6901 *et* seq.

[19] 49 CFR § 172.101, and 49 CFR, Part 173.

obtain an EPA identification number, and are not allowed to accept shipments without complete manifests. Waste cannot be stored for more than 10 days without becoming subject to storage facility regulations and only facilities with RCRA permits must be used. Transporters of hazardous waste must follow the EPA and DOT regulations concerning spilling and reporting of spills, and must retain records for a minimum of two years (FMCSA 2001d).

The gas, oil, and other fluids in the engine that are required for vehicles to operate properly are not regulated by the FMCSA. If and when crashes occur that cause the release of these substances, the proper authorities are notified and these authorities will perform any necessary clean-up activities.

The Proposed Action will not alter the existing regulatory framework governing the transportation or storage of hazardous materials. The main impacts on hazardous materials would be related to public health and safety, since crashes may involve CMV transporting hazardous materials. As will be discussed in Chapter 4, the Proposed Action may result in a beneficial impact to public safety. As a result, there should be negligible impacts with regard to hazardous materials. For more information on hazardous materials, see Appendix D.

Solid Waste

The generation of solid waste is not exclusive to any industry. However, the transportation sector will not be generating any significant additional solid waste as a result of FMCSA's implementation of the rules set forth in this document.

The transportation sector generates a good deal of solid waste that is either recycled or ends up in landfills. Discarded vehicles and vehicle parts and abandoned infrastructure, such as pavement from highways or rail line materials, are the major elements of transportation solid wastes. Much of the material generated by scrapping automobiles and trucks is currently recycled. Further changes in CMV, such as even greater use of recycled and recyclable materials would complement these efforts.

The Proposed Action does not entail new construction or an increase in the overall total number of CMC operating in the United States. In addition, FMCSA has concluded that there will be no more than a minimal increase in resource consumption and waste disposal. Since the Proposed Action does not significantly affect the generation of solid wastes, this resource will not be further analyzed in Chapter 4.

Topography and Geology

Topographic and geologic structures have the potential to be impacted with the construction of highways, roads, and associated facilities, including inspections stations. Construction has the potential to change the face of the land as blasting occurs with the creation of buildings and roads. However, all CMV operations conducted pursuant to the Proposed Action will occur using existing highways and roadway systems. In addition, all currently planned roadside inspections would be carried out at existing facilities. Therefore, no construction activities directly related to the proposed rulemakings are expected.

Since the proposed actions do not involve activities with the potential to significantly affect topographical

or geological resources, these resources will not be further analyzed in Chapter 4.

Biological Resources

The biological resources of the United States consist of all terrestrial and aquatic flora and fauna and the habitats in which they occur. They may be divided into the following seven major terrestrial climatic regions: tundra, taiga, temperate deciduous forest, grassland, desert, scrub forest, and tropical forest. The United States Fish and Wildlife Service (United States FWS) has jurisdiction over terrestrial and freshwater ecosystems and the National Marine Fisheries Service (NMFS) has jurisdiction over marine ecosystems. Protected biological resources include sensitive habitats and species under consideration for listing (candidates species) or listed as threatened or endangered by the United States FWS or by individual States. Sensitive habitats include areas protected by legislation or are habitats of concern to regulating agencies. Endangered species are presented in a separate subsection.

Some of the habitats that characterize the border zone are desert, aquatic, riparian, and mountainous regions. As previously mentioned, the border zone contains sections of both the Chihuahuan and Sonoran Deserts. Rainfall in the desert is less than 10 inches per year and grasses cannot survive. This arid region is subject to the most extreme weather fluctuations in the country. During the day, intense sunlight raises air and soil temperatures very high and at night the heat is lost rapidly. Most desert animals are active primarily at night or during the brief periods in early morning and late afternoon when the heat is not so intense. The major scrub forests of the United States are the chaparral and coastal sage scrub communities in western

California. The region is dominated by shrubs and multi-stemmed trees that are typically less than 16 feet in height. Both types of communities are subject to periodic fires.

Aquatic ecosystems in the border zone consist of freshwater and coastal ecosystems, and wetlands ecosystems. These resources support a variety of wildlife. The Rio Grande (spanning Texas, New Mexico, and Colorado) and the Colorado River (running through California and Arizona) are the major rivers within the border zone. Additionally, to the east, the Texas border zone touches the Gulf of Mexico. Wetlands areas are located in transitional areas of freshwater and saltwater. Riparian ecosystems encompass all terrestrial areas of relatively high soil moisture that occur adjacent to rivers and streams. These areas would exist adjacent to the Rio Grande, Colorado River, and the many tributaries to those rivers. Riparian zones provide habitat for a wide variety of species. In arid to semi-arid regions, riparian zones often support the only significant forest habitats and harbor a large number of wildlife species in comparison to surrounding uplands. The biological resources of riparian areas are extremely sensitive to changes in water level, neighboring vegetation, and sedimentation.

Construction activities have the potential to result in habitat destruction. However, all CMV operations conducted pursuant to the Proposed Action will occur using existing highway and roadway systems. In addition, all currently planned roadside inspections would be carried out at existing facilities. Therefore, no construction activities directly related to the proposed rulemakings are expected.

Air quality and noise impacts may also effect biological resources, some of which are very sensitive to the quality of air and the amount of noise in their habitats. However, as will be discussed in Chapter 4, air quality and noise impacts associated with the proposed actions are minor.

Since the Proposed Action does not involve activities with the potential to significantly effect biological resources, these resources will be further analyzed in Chapter 4.

Invasive Species

In 1999 Former President Clinton issued Executive Order 13112 on invasive species. This EO directs Federal agencies to identify agency actions that affect the status of invasive species. An invasive species is an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health. This introduction does not have to be intentional and most introductions are unintentional. The transportation sector has contributed to such unintentional introductions. For example, the Asian Longhorn Beetle was first discovered in the United States in 1996. This species is believed to have arrived in the United States via cargo ships from Asia. The Asian Longhorn Beetle is a threat because it eats the insides of a living tree until it weakens and dies. Since its 1996 discovery in the Northeastern United States, thousands of trees have been infested. There are many other examples, including the introduction of the brown tree snake in Guam by military aircraft during World War II. This species of snake, originally from New Guinea, has eliminated 9 of 11 species of native birds and has caused major power outages by climbing on power lines and into electronic equipment. Introduced

plants are not any less of a problem. The introduction of kudzu in the southeastern states and purple loosestrife in the north, have choked out native plant species impacting the wildlife and fish of those regions. Executive Order 13112 has reinforced and expanded DOT agency efforts to address this issue.

DOT agencies are working with other Federal and State agencies, as well as the international community in developing strategies to reduce the risk of invasive species introduction. The importation of goods from Mexico by CMV can potentially introduce species into the United States within the transported cargo or on the CMV themselves. However, as noted in Chapters 1 and 2, the promulgation of the four proposed rules will not affect the cargo imported from Mexico or the use of trailers from Mexico to haul this cargo.

Since the proposed actions do not include activities with the potential to affect the status of invasive species, this issue will not be further analyzed in Chapter 4.

Endangered Species

The Endangered Species Act of 1973 (ESA)[20] declares the intention of Congress to protect all federally listed threatened and endangered species. This includes both flora and fauna, and their designated critical habitat. Section 7 of the ESA outlines requirements for Federal agencies' actions, whether authorized, funded or carried out. Federal agencies may not jeopardize endangered or threatened species or adversely affect critical habitat. Critical habitat, as defined in the ESA is the specific location within the geographic area occupied by the species essential to the conservation of the species, which may require special management consideration

[20] 16 U.S.C. §§1531-1543).

or protection.[21] Critical habitat does not include the entire geographic area that can be occupied by the threatened or endangered species.[22]

The United States Fish and Wildlife Service (USFWS) is the primary regulatory agency responsible for compliance of the ESA. The USFWS maintains additional flora and fauna categories that are not legally protected, but should be considered during the planning process for any Federal project. These additional categories are Proposed Threatened, Proposed Endangered, and Candidate Species. Listed and candidate species—at the Federal and State levels—occur throughout the United States, although within a relatively small proportion of the total surface area of the nation.

Since there would be no construction activities associated with the Proposed Action, any impact to endangered species would only occur as a secondary impact due to decreased traffic safety, decreased quality of air, or increased noise disturbance. Some of the resources that could be secondarily impacted are the several areas of protected habitat in the border zone region. Most notable is Big Bend National Park as well as Guadalupe Mountains National Park. Additionally, there are several State parks and wildlife refuges within the United States-Mexican border zone. The USFWS lists one hundred and fifty four endangered and threatened species as ranging in the four States (Arizona, California, New Mexico, Texas) along the United States-Mexican border zone. Many of these are specific to those States (USFWS 2001).

[21] 16 U.S.C §1532(5)(A).

[22] 16 U.S.C. § 1532(5)(C).

As will be discussed in Chapter 4, public safety, air quality and noise impacts associated with the proposed actions would be beneficial and/or minor, resulting in no significant impacts to endangered species. Therefore there will be no further analysis of endangered species in Chapter 4.

Water Resources

The water resources of the United States include groundwater and surface water. Groundwater is found beneath the surface of the earth. Sources of groundwater include rainfall and surface waters, such as lakes, rivers and wetlands. These waters penetrate and move through the soil to the water table.

Much of the nation's drinking water is supplied from groundwater aquifers. Groundwater is an important source of water supply for municipalities, agriculture, and industry. Western and Midwestern areas of the United States are generally much more dependent on groundwater than other areas of the country. Many of these States depend on groundwater for over 50 percent of their drinking water needs. Surface waters include rivers, streams, wetlands, and lakes.

Surface and groundwater resources are both used in the border region to maintain economic development. The availability of water is a critical issue in the region. Annual rainfall in the region varies from approximately 7 to 25 inches.

Surface water resources include several rivers, streams, and tributaries as well as two international reservoirs. The chief surface water resource in the border zone is the Rio Grande River. The Rio Conchos, Rio San Juan, and Rio Salado are all main tributaries to the Rio Grande, the main international river in the

border region. The Rio Grande not only traverses two countries, but also three United States states, 19 tribal and pueblo lands and five Mexican states. The Rio Conchos also feeds the region's two international reservoirs. Combined, the reservoirs' storage capacity totals 6.05 million acre-feet of water. These international water resources are governed by two treaties between the United States and Mexico, established in 1906 and 1944 through the International Boundary and Water Commission. In addition to the two international reservoirs (Amistad and Falcon) in the border region, the region contains the United States' Elephant Butte Reservoir, a water resource for New Mexico and parts of Texas.

Groundwater, also used widely in the border region, is provided through use of aquifers. One notable aquifer is the Edwards Aquifer in south-central Texas. It is the chief water supply to more than 2 million people. Much of the border zone's groundwater sources come from shared Mexican/United States aquifers. There is no international agreement detailing sharing or protection of these aquifers (TNRCC 2001).

One method by which the transportation sector may adversely impact water sources is through the generation of air pollution. The generation of NO_x emissions that mix in the atmosphere with SO_X is the biggest potential impact CMV have on water quality. An increase in emissions of these pollutants would decrease air quality and in turn, adversely impact water resources through the creation of acid rain. Acid rain is not a significant problem in the border crossing region or the Southwest. There are no sensitive bodies of water in the Southwest due to natural filtration of NO_x and SO_X emissions by the land. Acid rain is a problem in the

Northeast because the soils are naturally more acidic and not buffered by lime or other natural elements. New CMV emission standards in the United States are expected to be implemented between 2004 and 2007, lowering NO_x and PM emissions by almost 90 percent. Low-sulfur diesel fuel will allow after-treatment with three-way catalytic converters that will reduce NO_x, VOC, CO, PM, and SO_X.

Another method by which the transportation sector adversely impacts water quality is through incidents such as oil and fuel leaks and spills, particularly from tankers, motor vehicles, and fuel storage tanks. Runoff from roads, infrastructure construction, and deterioration of discarded vehicles have an impact on wetlands, surface and groundwater quality as well (United States DOT/RSPA 2001).

As will be discussed in Chapter 4, air quality impacts associated with the Proposed Action would be minor, and public safety impacts would be beneficial. Therefore, water resource impacts would be minimal. As a result, there will be no further analysis of water resources in Chapter 4.

Cultural, 4(f) and Farmland Resources

Cultural resources consist of prehistoric and historic sites that are important to a culture. There are four different categories of cultural resources- prehistoric archaeological resources, paleontological resources, historic/architectural resources, and Native American resources.

Federal agencies are legally required to consider the effects of a proposed project on cultural resources. The primary law protecting cultural resources is the

National Historic Preservation Act of 1966 (NHPA).[23] It addresses the identification and preservation of historic properties, as well as coordination among Federal agencies. The region of influence for cultural resources encompasses any area potentially affected by the implementation of the Proposed Action as defined under Section 106 of the NHPA.

Some forms of recreational opportunities and parklands are protected from impacts due to federal projects. Impacts to coastal, water-dependent recreation are considered under the Coastal Zone Management Act, whereby potential impacts may be reviewed and regulated by the administering state. Impacts to significant publicly owned parks and recreation areas, wildlife/waterfowl refuges, as well as certain historic sites, are regulated under Section 4(f) of the Department of Transportation Act.[24] These resources are found throughout the United States and adjacent to roadways and inspection areas.

Farmland is a valuable resource that is often lost to development projects. The purpose of the Farmland Protection Act is to minimize the extent to which federal programs convert farmland to non-agricultural uses.[25] Soils classified by the United States Department of Agriculture, Natural Resource Conservation Service as prime or unique are collectively protected by this Act. In addition to this federal regulation, several states have enacted their own regulations to aid in protection of farmland.

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[23] 16 U.S.C. Sec 470 et seq.

[24] 49 U.S.C. Sec 303 (c)

[25] Pub. Law. 97-98, Sec 1530-1549, codified at 7 USC 4201, et seq

Cultural, 4(f) and farmland resources could be indirectly affected through decreased air quality and increased acid rain as a result of increased emissions from CMV or through changes to topographical or geological resources. Considering the history and culture of the region, it is reasonable to foresee that substantial resources from several cultures, including Native American, Tejano, Mexican, and Latino, are located in this border region. Realizing the distinct history and heritage that the southwest holds, it follows that there are many sites of cultural, 4(f) and farmland resources protected in the Border States.

As will be discussed in Chapter 4, air quality impacts associated with the proposed actions would be minor. As a result, impacts on cultural, 4(f) and farmland resources would be minimal. Therefore there will be no further analysis of cultural, 4(f) and farmland resources in Chapter 4.

Visual Resources

Visual resources can be defined as the physical features of a landscape that affect the viewer's perception of the vista. Mountains, rivers, plains, buildings, power lines and roads are natural and human- made landscape features that contribute to the impression the landscape makes on its viewers. Within the United States, there are four general landscape types, natural, rural, urban, and transitional settings.

Each type is identified by the relative dominance of natural and artificial features present. All of these types of visual resources are subject to be affected by the proposed actions. These effects would most likely occur through secondary impacts of increased CMV emissions that may deteriorate air quality. Deterioration in air quality can lead to significant obstructions of

views and vistas through the formation of haze and smog. These issues are covered in the air quality section.

Natural landscapes are classified as those areas dominated by physiographic landforms and pristine natural scenes and where there is an absence of all human influence. Rural landscapes are classified as areas that include small towns and villages, sparsely distributed homes, agricultural fields, silos, barns, and ranging livestock. Urban landscapes are classified as areas dominated by human activity and infrastructure. Transitional landscapes occur within the classifications of any of the above three types.

Within the border zone, all four types of landscapes can be seen. These visual resources can be classified as natural, rural, urban, and transition landscapes. Most notable natural landscapes would be those within Guadalupe Mountains and Big Bend National Parks. Specifically, parts of Rio Grande as it flows through Big Bend National Park have been designated as "wild and scenic" under the Wild and Scenic Rivers Act, and thus protected. However, there are many more areas that could be considered as visual resources than just those spaces within the National Parks. Rural landscapes occur in the more pastoral areas across the border zone. Most of the actual border crossings are more typical of urban landscapes and transitional landscapes bridge the many visual resources mentioned.

As will be discussed in Chapter 4, air quality impacts associated with the proposed actions are minor, so there will be no further analysis of visual resources in Chapter 4.

4. ENVIRONMENTAL CONSEQUENCES

This Chapter of the PEA addresses the potential environmental consequences associated with the Baseline, No Action, and Proposed Action Alternatives. The analysis focuses primarily on the environmental impacts associated with changes in the number of Mexican CMV operated and inspected under the three alternatives. As in Chapter 2, the analysis for each potential environmental impact area is divided into two subsections, the first addressing the impacts of the Mexico-domiciled CMC application process, and the second addressing the impacts from FMCSA's safety monitoring of Mexican CMV. A summary is provided that considers the total potential impact. The potential impacts are quantified, and direct comparisons between the alternatives are made, where possible.

Five of the areas of potential concern identified in Chapter 3 are discussed in detail in this Chapter. These five areas were selected because they may be directly impacted by the operation or inspection of CMV, or because direct impacts in these environmental areas could result in secondary impacts in other environmental areas. For example, direct impacts on air quality may cause secondary impacts on biological resources, water resources, visual resources, or endangered species. The Transportation and the Public Safety areas were analyzed to determine the probable affect that the alternatives would have on traffic congestion and safety involving CMV. The Air Quality and Noise areas were analyzed to determine how emission levels of air pollutants and noise would potentially be affected by the alternatives. Finally, the Socio-economics area was analyzed to determine whether the

distribution of impacts would disproportionately affect minority or low-income communities.

4.1. TRANSPORTATION

This section addresses the potential effects on traffic and congestion from the current baseline conditions, the No-Action alternative, and the Proposed Action.

4.1.1 Applications for Operating Authority

Baseline — Moratorium Retained with Current Application Forms

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and FMCSA would take no action to modify its current application forms OP-2 and OP-1 (MX) for Mexico-domiciled CMC. Mexico-domiciled CMC would use the existing Form OP-2 to apply for operating authority within the border zone, or the existing Form OP-1 (MX) to apply for operating authority beyond the border zone. With the moratorium in place conditions, FMCSA would continue to be prevented from processing OP-1 (MX) applications, and thus Mexico-domiciled CMC would not receive authority to operate beyond the border zone. FMCSA would continue to receive approximately 1,300 new applications annually from Mexico-domiciled CMC seeking authority to operate in the United States. Under baseline operating conditions, the amount of goods imported from Mexico may continue to increase at approximately 9% per year. This increase in the amount of goods imported from Mexico may cause an increase in the number of northbound truck crossings from Mexico into the United States. With the moratorium in place, most goods would continue to be delivered to transfer stations on the U.S side of the border, where the trailer and/or the goods

would be transferred to a United States CMV. These goods would then be delivered by a United States CMV to their intermediate or final destinations throughout the United States. Many of these goods would continue to be carried across the border by drayage carriers whose sole fiction is to ferry goods from transfer stations along the border in Mexico to transfer stations within the United States border zone.

Therefore, under baseline operating conditions, the total volume of goods imported from Mexico in 2002 could be approximately 36 million United States short tons, of which approximately 75%, or 27 million United States short tons, may be transported by truck. This amount of trade could generate approximately 5 million northbound truck crossings from Mexico into the United States in FY 2002. These truck crossings could continue to be made by both United States-domiciled CMC and Mexico-domiciled CMC with authority to operate in the United States. FMCSA estimates that 10,800 Mexico-domiciled CMC would operate approximately 71,500 CMV within the border zone in FY2002, all pursuant to OP-2 authority. This volume of traffic could continue to cause congestion problems at the border and along the major transportation corridors leading into the United States from Mexico.

No-Action — Moratorium Modified with Current Application Forms

Under the No-Action Alternative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its current application forms for Mexico-domiciled CMC - OP-2 and OP-1 (MX). Under this alternative, Mexico-domiciled CMC would be eligible to receive authority to operate their CMV both within the border zone pursuant to OP-2 authority and

throughout the United States pursuant to OP-1 (MX) authority, and would thus be permitted to transport their freight to intermediate or final destinations throughout the United States.

As discussed in Chapter 2, the FMCSA expects that the No Action Alternative may cause a slight increase in the total amount of goods imported into the United States from Mexico. In addition, economic opportunities created by the No Action Alternative could result in an approximate 10% increase in the annual number of Mexico-domiciled CMC applying for new authority to operate in the United States. As a result, FMCSA estimates that 11,000 Mexico-domiciled CMC would be authorized to operate approximately 73,000 CMV within and beyond the border zone in FY 2002. However, a portion of the increase in the number of Mexican CMV actually traveling within or beyond the border zone should be offset by a decrease in the number of United States CMV traveling these same routes. In addition, the increase in the number of Mexican CMV represents a very small fraction of the approximately 4.5 million CMV currently operating in the United States .

This modest increase in trade and in the total number of Mexico-domiciled CMC with authority to operate CMV in the United States, compared to Baseline conditions, should not exacerbate the current traffic and congestion problems at the border.

Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action Alternative, a Presidential order would modify the moratorium and FMCSA would revise its current application forms OP-2 and OP-1 (MX) for Mexico-domiciled CMC, in order to improve

FMCSA's capability to determine the willingness and ability of Mexico-domiciled CMC to comply with United States CMC safety regulations. Thus, under this alternative, Mexico-domiciled CMC could be eligible to receive authority to operate their CMV both within the border zone pursuant to the revised OP-2 authority, and throughout the United States pursuant to the revised OP-1 (MX) authority.

Under the second rule, CMC intending to operate beyond the border zone pursuant to OP-1(MX) authority would be subject to a safety audit prior to receiving authority to operate in the United States. FMCSA expects that this requirement should not affect the total number of Mexican CMV operating in the United States nor the total number of Mexican CMV inspections, because the operations of carriers that fail the safety audit should be replaced by the operations of carriers that pass the audit. By requiring a pre-authority safety audit, FMCSA should be able to better ensure that only safe CMC would operate in the United States. Ensuring the safe operation of CMV would improve overall highway safety and result in a decrease in the total number of CMV crashes. A decrease in CMV crashes should cause a decrease in crash-related congestion. This could result in a beneficial impact on transportation and congestion both within the border zone and throughout the United States. This effect is difficult to quantify but is expected to be minor, however, given the proportion of Mexican to total CMV operating throughout the United States.

As discussed in Chapter 2, the FMCSA expects that the Proposed Action Alternative should have no effect on the total amount of goods imported into the United States from Mexico relative to the No Action Alternative. However, economic opportunities created by the Proposed Action would result in an increase of approximately 5% in the annual number of Mexico-domiciled CMC applying for new authority to operate in the United States. FMCSA expects that the increase in the number of new applications from Mexico-domiciled CMC could be less under the Proposed Action Alternative than under the No Action Alternative because the revised application forms would deter some applicants that would not be able to demonstrate their willingness and ability to comply with United States safety regulations. Thus, the FMCSA estimates that 10,900 Mexico-domiciled CMC could be authorized to operate approximately 72,000 CMV within and beyond the border zone.

Therefore, while the total number of Mexico-domiciled CMC with authority to operate their CMV in the United States may increase under the Proposed Action Alternative compared to the Baseline conditions, it would decrease relative to the No Action Alternative. However, since the changes in the number of Mexican CMV are a very small fraction of total United States CMV operations, they would have a very minor impact on the current traffic and congestion problems at the border. In addition, as discussed in Chapter 2, the Proposed Action Alternative should not affect the total amount of goods transported between the United States and Mexico, which would continue its approximate 9% rate of increase experienced under Baseline conditions. Since the total amount of trade would be unchanged from the No Action Alternative, the total number of northbound truck crossings also would not change from the 9% rate of increase expected under the No Action Alternative operating conditions. Therefore,

increases in the number of Mexican CMV actually operating within or beyond the border zone compared to the Baseline alternative would be largely offset by a decrease in United States CMV operating along those same routes. Likewise, a decrease in the number of Mexican CMV in operation compared to the No Action Alternative would be largely offset by an increase in the number of United States CMV in operation along those same routes. Thus, this part of the Proposed Action Alternative would not further impact transportation systems at the border or in the United States when compared to the conditions under either the Baseline or No Action Alternatives.

4.1.2 Safety Monitoring for Mexico-Domiciled Motor Carriers

Baseline — Moratorium Retained with Current Safety Monitoring Program

Under a continuation of current baseline operating conditions, with the moratorium unmodified, Federal, State and local authorities would conduct safety inspections of United States, Canadian, and Mexican CMV at the border, at designated roadside inspection stations throughout the United States, at individual carriers' places of business, or at any point along the roadway system. The safety monitoring for Mexican CMV would be largely limited to monitoring border zone operations since most Mexico-domiciled CMC operations would be confined to the border zone. These inspections would not include verification of compliance with the FMVSS labeling requirement.

Based on current and projected numbers of inspections, including FMCSA' s anticipated addition of 85 new Federal inspectors, FMCSA estimates that 2.77 million total CMV inspections could occur in the United States

in 2002, with approximately 170,000 of these inspections involving Mexican CMV. These safety inspections take between 40 to 50 minutes to complete. The inspection process involves selecting one CMV for inspection per inspection area at a time, with fixed inspection stations often accommodating several inspection areas. Since the inspection process at fixed locations involves choosing CMV out of the lines for the weigh stations, at a rate of one CMV per inspection area at a time, the potential effect of inspections on congestion at and around the inspection stations is minimized.

No-Action — Moratorium Modified with Current Safety Monitoring Program

Under the No Action Alternative, the FMCSA would take no action to modify its current inspection and review authority after the Presidential order to modify the moratorium is implemented. FMCSA expects that once the moratorium is modified, some Mexico-domiciled CMC could apply for and receive authority to operate beyond the border zone. FMCSA would continue conducting inspections on Mexican CMV following the same guidelines used for United States and Canadian CMV. These inspections would occur both within and beyond the border zone, and would continue to occur at the border, at designated roadside inspection stations, at individual carriers' places of business, or at any point along the roadway. These inspections would not include verification of compliance with the FMVSS labeling requirement.

As the number of Mexican CMV operating the Unites States increases, and the length of the trips these CMV make increases, the number of inspections performed on Mexican CMV will likely increase as well. In addition, FMCSA will continue to deploy additional inspec-

tors at the border, as described under the Baseline Scenario. FMCSA estimates that 2.78 million total CMV inspections would occur in the United States in 2002, with approximately 180,000 of these inspections involving Mexican CMV. All inspections would continue occurring at existing facilities. The safety inspections performed on Mexican CMV should occur throughout the United States, and would not be limited to the border zone. In addition, since the total number of inspections in the United States should increase only marginally, there should be only a minor effect on transportation from the No Action Alternative.

Proposed Action — Moratorium Modified with Revised Safety Monitoring Program for Mexico-Domiciled Motor Carriers

Under the Proposed Action, a Presidential order to modify the moratorium would be implemented and FMCSA would promulgate two new safety monitoring rules. The first rule would establish a safety monitoring system for all new applicant Mexico-domiciled CMC operating within and beyond the border zone. This system would include safety audits and compliance reviews to ensure that Mexico-domiciled CMC comply with applicable safety regulations and conduct safe operations within the United States. The second rule would allow FMCSA to enforce CMC compliance with the FMVSS labeling requirement.

FMCSA expects that once the moratorium is modified, some Mexico-domiciled CMC would apply for and receive authority to operate beyond the border zone. Under the Proposed Action Alternative, the revised Safety Monitoring System would monitor the operation of Mexican CMV within and beyond the border zone. FMCSA would continue conducting inspections on

Mexican CMV following the same guidelines used for United States and Canadian CMV. These inspections would take place at the border, at designated roadside inspection stations, at individual carriers' places of business, or at any point along the roadway. These inspections would include verification of compliance with the FMVSS labeling requirement.

As discussed in Chapter 2, FMCSA expects the trends in the total number of inspections identified under the No Action Alternative to continue. As a result, FMCSA estimates that there could be the same schedule of inspections as under the No Action Alternative, with approximately 180,000 inspections of Mexican CMV in 2002, and a total number of CMV inspections in the United States of 2.78 million. All inspections would occur at existing facilities throughout the United States, using the same resources as those that would be used under the No-Action scenario. Thus, there would be no change on transportation from the inspections schedule under this part of the Proposed Action.

Therefore, the implementation of these rules should not result in any additional congestion at and around the inspections stations. In addition, as will be discussed further in the next section on Public Safety, the Mexican CMV that do not comply with safety regulations and standards would be put out-of-service, thus removing them from the roadways. By removing unsafe CMV from the transportation system, overall highway safety should improve and result in fewer CMV crashes. A decrease in CMV crashes would result in a decrease in safety-related congestion. This would result in a beneficial impact on transportation and congestion within and beyond the border zone. This effect is difficult to quantify but would likely be minor, given

the proportion of Mexican to total CMV operating throughout the United States under this part of the Proposed Action.

Commercial Vehicle Safety Alliance Decal - Proposed Requirement:

Under the Proposed Action, Mexico-domiciled CMC granted provisional operating authority pursuant to Form OP-1 (MX) would be required to maintain a current CVSA decal on all their CMV operating within the United States. In addition, CMC would be required to maintain current CVSA decals on their CMV for three years after receiving permanent OP-1 (MX) authority. FMCSA estimates that this requirement could result in 230,000 Mexican CMV inspections in 2002. The additional inspections are necessary to meet the CVSA requirement of four yearly inspections for Mexican CMV operating pursuant to OP-1 (MX) authority. It was assumed that the average number of inspections per Mexican CMV operating pursuant to OP-2 authority should be the same as that under the Proposed Action and No Action scenarios. Thus, the total number of CMV inspections in the United States should be 2.83 million. However, these inspections would be carried out at the same locations as inspections under the previous scenarios, or at other existing facilities where CVSA decal inspections currently take place. Since the increase in inspections represents a very small fraction of total nationwide inspections, there should be negligible effects on transportation and congestion from the intensified schedule of inspections for Mexican CMV.

As will be discussed further in the next section on Public Safety impacts, the increased number of inspections required by this alternative would help to

ensure the safe operation of Mexican CMV in the United States, because CMV that do not pass inspections will be placed out-of-service and removed from the roadways. By removing unsafe CMV from the transportation system, overall highway safety could improve and result in fewer CMV crashes. A decrease in CMV crashes would cause a decrease in crash-related congestion.

This could result in a beneficial impact on transportation and congestion both within the border zone and throughout the United States. This effect is difficult to quantify but is expected to be minor, given the proportion of Mexican to total CMV operating throughout the United States.

4.1.3 Summary of Impacts of the Proposed Action on Transportation

No Action — Moratorium Modified with Current Application Forms and Current Safety Monitoring Program

The potential transportation impacts of the No Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring system. The No Action Alternative could result in an increase in the number of Mexican CMV operating and being inspected in the United States relative to the Baseline Scenario. The contribution of these increases compared to nationwide operations and inspections on CMV is very minor. In addition, these minor increases in the number of Mexican CMV operating within the United States could be further reduced by an offset from the reduction in the operations associated with those United States CMV trips replaced by trips carried out by some of the new entrant Mexican CMV operating within the United

States. Furthermore, inspections on Mexican CMV would no longer be restricted to the border zone but could occur anywhere in the United States. Thus, the No Action Alternative could result in very minor adverse impacts to transportation and congestion in the United States.

Proposed Action — Moratorium Modified with Revised Application Forms and Revised Safety Monitoring System

The potential transportation impacts of the Proposed Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program (including implementation of the CVSA requirement). The resulting numbers of Mexican CMV operating and being inspected were compared to those calculated under the Baseline Scenario and the No Action Alternative. When compared to the Baseline Scenario, the Proposed Action could result in a marginal increase in the number of Mexican CMV operating in the United States. In addition, there could be an increase in the number of inspections on Mexican CMV. When compared to the No Action Alternative, the Proposed Action could result in a marginal decrease in the number of Mexican CMV operating within the United States. In addition, there could be an increase in the number of inspections on Mexican CMV.

Although there is a slight increase in the number of Mexican CMV operating within the United States when considering the combined effect of the No Action Alternative and the implementation of the Proposed Action, this increase is a result of the No Action Alternative and not the Proposed Action itself. In fact, the Proposed Action results in a slight reduction in the number of Mexican CMV operating in the United States. However, the changes in resulting numbers of Mexican CMV are negligible when compared to national operations of CMV. Further, any increase in the number of Mexican CMV operating in the United States would be largely offset by a decrease in United States CMV operating along these same routes.

The increases in the number of inspections on Mexican CMV would not have an effect on transportation since these inspections would be dispersed throughout the United States. In addition, there could be safety benefits from the increased inspections that could result in transportation benefits from the reduction of crashes and other safety related incidents, which lead to congestion. Therefore, the implementation of the Proposed Action could result in a beneficial impact to transportation and congestion in the United States. This effect would be minor given the proportion of Mexican to total CMV operating throughout the United States.

4.2. PUBLIC SAFETY AND HEALTH

This section addresses the potential effects on public safety and health from the Baseline, No Action, and Proposed Action. A more detailed analysis of the safety benefits associated with the proposed rules can be found in the *"Regulatory Analysis and Regulatory Flexibility Analysis"* documents developed by the FMCSA to evaluate the costs and benefits of the Proposed Action.

4.2.1 Applications for Operating Authority

Baseline — Moratorium Retained with Current Application Forms

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current application forms would not be revised. Mexico- domiciled CMC would remain largely limited to operating in the border zone. Most goods imported from Mexico by CMV would continue to be carried across the border by drayage carriers and delivered to transfer stations in the border zone. United States-domiciled CMC would continue to transport these goods from the transfer stations to their intermediate or final destinations throughout the United States.

No-Action — Moratorium Modified with Current Application Forms

Under the No Action Alternative, the moratorium would be modified by Presidential order and FMCSA would take no action to revise its current application forms OP-1(MX) and OP-2 for Mexico-domiciled CMC. Mexico-domiciled CMC would become eligible to operate beyond the border zone. As a result, FMCSA assumes some goods previously imported across the border by Mexican drayage carriers may be imported by Mexican long-haul carriers. Likewise, Mexico-domiciled CMC may transport some goods previously transported to transfer stations in the border zone directly to final destinations in the United States.

The potential shifting of trips from Mexico-domiciled drayage carriers to long-haul carriers may occur as some goods are delivered directly from Mexico to final destinations in the United States. The long-haul fleet may make these trips across the border in lieu of the drayage fleet, which is typically not maintained in a

condition that allows for long distance cross-country trips. As discussed in Chapter 3, the out-of-service rate for the Mexican long-haul fleet is substantially better than the rate for the Mexican drayage fleet. This indicates that the Mexican long-haul fleet is better maintained and safer than the drayage fleet. Thus, a shift from drayage carriers to long-haul carriers may result in a beneficial impact to public safety.

The shifting of trips from Mexico-domiciled long-haul carriers to United States-domiciled long-haul carriers may occur as some goods are delivered directly from Mexico to final destinations in the United States. The Mexican long-haul fleet may replace a small segment of the United States long-haul fleet for those trips where it may be economically efficient for a Mexican CMV to make the trip. As discussed in Chapter 3, the Mexican long-haul fleet has an out-of-service rate comparable to the rate for the United States long-haul fleet. Thus, the shift from United States to Mexican long-haul CMV would not result in an impact to public safety.

Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action Altemative, the moratorium would be modified by a Presidential order and the FMCSA would revise its current application forms OP-2 and OP-1 (MX) for Mexico-domiciled CMC. The revision of the application forms should improve FMCSA's capability to determine the willingness and ability of Mexico-domiciled CMC to comply with United States safety standards. This should improve FMCSA's ability to identify unsafe CMC and deny them operating authority. As under the No Action Alternative, Mexico-domiciled CMC would become eligible to operate beyond the border zone. As a result,

some goods previously imported across the border by Mexican drayage carriers may be imported by Mexican long-haul carriers. Some goods previously transported from transfer stations in the border zone to final destinations in the United States by United States-domiciled CMC could instead be transported by Mexico-domiciled CMC. The number of trips made by Mexican carriers as opposed to United States carriers could be lower under the Proposed Action Altemative than under the No Action Alternative.

Under the second rule, Mexican CMC seeking to operate beyond the border zones under Form OP-1(MX) authority would be subject to a safety audit, prior to receiving authority to operate within the United States. This requirement should create a more stringent screening process for applicants that should improve the ability of the FMCSA to deny entry to the highest risk Mexico-domiciled CMC. The decrease in the number of unsafe Mexican trucks and buses on the roadways should promote public safety and health by reducing the number of incidents associated with the operation of unsafe Mexican CMV in the United States. The total number of accidents,—and related injuries and fatalities,—potentially avoided by this requirement is difficult to quantify. This requirement should result in an overall benefit to public health and safety, by reducing the number and proportion of high-risk CMC and CMV operating in the United States.

The revision of the application forms under this alternative may improve FMCSA's ability to screen applicants for either OP-1(MX) or OP-2 authority. The revised application forms would require applicants to provide more detailed information regarding the nature of their operations. Mexican carriers would plan for

ensuring compliance with United States safety laws and regulations. The carriers would provide contact points for taking enforcement action against the carriers for violations, and other information that could be used by FMCSA's safety monitoring resources. These revisions would result in a beneficial impact on public safety. The proportion of Mexico-domiciled CMC to all CMC conducting operations in the United States is small, so this benefit will be minor.

The revision of the applications forms under the Proposed Action Alternative may provide the greatest benefit to public safety. The shift from drayage to long-haul fleets for transporting goods across the border could result in a benefit when compared to a continuation of the Baseline conditions. There may be no impact to public safety from the shift between Mexican and United States long-haul carriers. The implementation of the Proposed Action could result in a beneficial impact to public safety relative to both a continuation of Baseline conditions or implementation of the No Action Alternative. The benefit may be greater in the border zone where a higher proportion of trips involve Mexico imported goods.

4.2.2 Safety Monitoring for Mexico-Domiciled Motor Carriers

Baseline — Moratorium in place with Current Safety Monitoring Program

Under a continuation of the current Baseline operating conditions, the moratorium would remain unmodified and the current safety monitoring program would not be revised. Eligible Mexico-domiciled CMC applying for operating authority would continue to receive permanent certificates of authority. Mexico-domiciled CMC would remain largely limited to operating in the

border zone, so safety inspections of Mexican CMV would continue to occur predominantly at the United States-Mexico border. Safety inspections would remain the primary tool used by Federal, State and local authorities to help ensure the safe operation of all CMV. These inspections would not include verification of CMC compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

No-Action — Moratorium Modified with Current Safety Monitoring Program

Under the No Action Alternative, the moratorium would be modified by Presidential order and FMCSA would take no action to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would continue to receive permanent certificates of authority. Mexico-domiciled CMC could be eligible to operate beyond the border zone, so safety inspections of Mexican CMV could occur both at the United States-Mexico border and at other inspection locations throughout the United States. Safety inspections would remain the primary tool used by Federal, State and local authorities to help ensure the safe operation of all CMV. These inspections would not include verification of CMC compliance with the FMVSS label requirement. Mexican CMV operating in the United States would continue to be inspected approximately two to three times per year on average.

Under the No Action Alternative, there would be no impact on public safety. As the range of Mexico-domiciled CMC operations expand beyond the border zone, a larger number of Mexican CMV inspections would occur at inspection stations beyond the border

zone. The inspection procedures used at these inspection stations are the same as the inspection procedures used at the United States-Mexico border. Thus, the likelihood that an unsafe condition on a CMV could be discovered may be the same at both inspection locations. As a result, there may be no public safety impact as a result of inspecting Mexican CMV at both the border and throughout the United States.

Proposed Action — Moratorium Modified with Revised Safety Monitoring System for Mexico-Domiciled Motor Carriers

Under the Proposed Action Alternative, the moratorium would be modified by Presidential order. The FMCSA would promulgate two rules to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would receive provisional certificates of authority for 18 months. As under the No Action Alternative, Mexico-domiciled CMC could be eligible to operate beyond the border zone, so safety inspections of Mexican CMV should occur both at the United States-Mexico border and at other inspection locations throughout the United States. All Mexico-domiciled CMC, including carriers with current certificates of authority, would be required to re-apply using the revised applications forms set forth in the first two rules. In addition to the safety inspections used by Federal, State and local authorities, FMCSA would also conduct at least one safety audit or compliance review while a carrier was operating under a provisional authority. Both the safety inspections and the safety audits could be used as tools to help ensure the safe operation of Mexican CMV. Safety inspections would include verification and enforcement of CMC compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States should

continue to be inspected approximately two to three times per year on average.

By granting provisional operating authority to Mexico-domiciled CMC and conducting a safety audit or compliance review prior to granting permanent authority at the completion of the 18-month period, FMCSA may improve its oversight of CMC operations. By focusing its improved oversight on the initial 18-month period of CMC operations in the United States FMCSA should be more likely to identify and reform unsafe CMC practices that relate to the CMC's inexperience with United States safety regulations. FMCSA should take expedited action against carriers found to have committed certain identified violations of the regulations. These actions may result in a benefit to public safety. By requiring Mexico-domiciled CMC with existing certificates of authority to re-apply using the revised forms OP-1 (MX) and OP-2, FMCSA should enhance its oversight of these CMC's operations. These requirements may result in a benefit to public safety.

Through verification and enforcement of the FMVSS labeling requirement, FMCSA would ensure that all CMV operating in the United States were manufactured in compliance with the FMVSS requirements in place on the date of their manufacture. These FMVSS requirements help ensure that CMV are free from defects or other conditions that could make their operation on the roadways unsafe. The verification and enforcement of the labeling requirement may result in a benefit to public safety.

<u>Commercial Vehicle Safety Alliance Decal - Proposed Requirement:</u>

Under this proposed requirement, all Mexico-domiciled CMC granted provisional operating authority under Form OP-1 (MX) would be required to maintain a current CVSA decal on all their CMV operating within the United States. In addition, CMC would be required to maintain current CVSA decals on their CMV for three years after receiving permanent OP-1 (MX) authority. FMCSA estimates that this requirement could increase the average number of inspections for CMV operating pursuant to OP-1 (MX) authority to approximately four inspections per year. The increase in the average annual number of inspections performed on CMV may provide a benefit to public health and safety. The benefit could be realized in three ways.

Firstly, the increase in the average annual number of inspections per vehicle increases the probability that an individual unsafe vehicle could actually be inspected in a given year. This increases the likelihood that the safety hazard on the unsafe vehicle may be discovered, that the unsafe vehicle could be removed from the roadway. As the likelihood of discovering unsafe vehicles increases, the actual number of unsafe CMV discovered and placed out of service should increase, thereby decreasing the number of unsafe vehicles on the roadway.

Secondly, as the number of unsafe vehicles discovered and placed out-of-service increases, the economic losses for CMC that operate these unsafe vehicles should increase. An increase in economic losses could create an economic disincentive for those carriers to continue operating unsafe vehicles. This may provide an economic incentive to properly maintain the vehicles. An

economic incentive to properly maintain vehicles may result in a greater number of safe vehicles on the roadway.

Thirdly, increasing the average annual number of inspections per vehicle should result in an average increase in the frequency of inspections per vehicle. As the average frequency of inspections increases, the average length of time between inspections becomes shorter. As the average length of time between inspections becomes shorter, the potential period of time during which a safety hazard on an individual vehicle may go undetected should decrease. As the period of time that a safety hazard may go undetected decreases, the amount of time that the public could be exposed to that hazard should decrease, resulting in a decrease in overall risk to public safety.

4.2.3 Summary of Impacts of the Proposed Action on Public Safety and Health

No Action — Moratorium Modified with Current Application Forms and Current Safety Monitoring Program

The potential public safety and health impacts of the No Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program. The No Action Alternative could result in an increase in the number of Mexican CMV operating and being inspected in the United States relative to the Baseline Scenario. The contribution of these increases compared to nationwide operations and inspections on CMV is very minor. In addition, a shift from drayage carriers to long-haul carriers may result in a beneficial impact to public safety due to the better operating condition of long-haul CMV. This benefit would be minor, however, given the

low proportion of CMV trips transporting goods imported from Mexico.

Under the No Action Alternative inspections on Mexican CMV would no longer be restricted to the border zone but could occur anywhere in the United States. Mexican CMV operating in the United States would continue to be inspected approximately two to three times per year on average. As the range of Mexico-domiciled CMC operations expand beyond the border zone, a larger number of Mexican CMV inspections would occur at inspection stations beyond the border zone. However, there may be no public safety impact as a result of inspecting Mexican CMV at both the border and throughout the United States.

Proposed Action — Moratorium Modified with Revised Application Forms and Revised Safety Monitoring Program

The potential public safety impacts of the Proposed Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program (including implementation of the CVSA requirement). The revision of the application forms should improve FMCSA's capability to determine the willingness and ability of Mexico-domiciled CMC to comply with United States safety standards. This should improve FMCSA's ability to identify and deny operating authority to unsafe CMC. The number of trips made by Mexican carriers as opposed to United States carriers could be lower under the Proposed Action Alternative than under the No Action Alternative. The revisions to the application forms could result in a beneficial impact on public safety. However, this benefit would be minor given the

low proportion of Mexico-domiciled CMC to all CMC conducting operations in the United States. In addition, the shift from drayage carriers to long-haul carriers compared to the Baseline could result in a beneficial impact to public safety.

As under the No Action Alternative, Mexico-domiciled CMC could be eligible to operate beyond the border zone, so safety inspections of Mexican CMV should occur both at the United States-Mexico border and at other inspection locations throughout the United States. The requirements set forth under the Safety Monitoring System portion of the Proposed Action would help FMCSA ensure that all Mexican CMV operating in the United States meet United States safety standards and regulations, thus promoting their safety of operation within the United States. Thus, the implementation of the Proposed Action could result in a beneficial impact to public safety relative to either a continuation of Baseline conditions or implementation of the No Action Alternative. The benefit may be greater in the border zone where a higher proportion of trips involve Mexico imported goods.

4.3. AIR QUALITY

This section addresses the potential effects on air quality from the current Baseline Scenario, the No-Action alternative, and the Proposed Action Alternative. The EPA emissions models—MOBILE5a and PART5—were used to quantify direct pollutant emissions resulting from the operation of and inspections on Mexican CMV. The emissions effects and inventories were calculated based on conservative average engine emission factors for Mexican CMV and did not take into account the exclusion of very high emitters. The data and assumptions in this list are generally very conservative

so actual emissions from the operation and inspection of Mexican CMV are expected to be significantly lower than those calculated here. The data and assumptions are presented in Appendix C, which presents detailed information on the modeling methodology, criteria pollutants, air quality health effects, legislation, current state of the environment, and source characteristics.

The determination of the contribution of emissions from the operation and inspection of CMV was carried out by comparing the calculated emissions with national levels of emissions from all on-road vehicle sources (e.g., light-duty and heavy-duty vehicles, commercial and private) and from all sources combined (e.g., transportation, industrial processes, fuel combustion, and miscellaneous). Emission values for on-road and "all sources" were obtained from the *National Air Quality and Emissions Trends Report, 1999*. Since the transportation sector continues to be a significant source of air pollutants at the national level, and total emissions continue to increase, current levels of emissions from the transportation sector are expected to be higher than those used in this analysis. Thus, the actual contribution of emissions from CMV operations and inspections should be lower than those presented here.

4.3.1 Applications for Operating Authority

As discussed in Chapter 2, the increase in the number of Mexican CMV that would operate within and beyond the border zone once the Presidential order to modify the moratorium is implemented would be partly offset by a decrease in the number of United States CMV operating along the same routes. The rate of replacement is at best difficult to quantify since the fashion in which Mexican CMC will respond to and operate under the new conditions resulting from the Presidential order

cannot be determined with any degree of certainty at this time. In addition, the total amount of cargo transported from Mexico into the United States could increase slightly with the Presidential order modifying the moratorium.

Therefore, the actual change in emissions under the different scenarios analyzed would be determined by the difference between the emissions from the additional trips carried out by Mexican CMV that would start operating in the United States once the Presidential order to modify the moratorium is implemented, and the emissions from the trips previously carried out by United States CMV that would be replaced by those Mexican CMV. Hence, the emissions profiles of the engines used by United States and Mexican CMV would determine the difference in emissions for every individual trip replacement. Since the ratio of replacement and Mexican engine emission profiles are difficult to predict, a conservative approach was used in this analysis in order to estimate the significance of any potential air quality impacts. The level of significance of air quality impacts was determined based upon the increase in emissions from the operation of the additional Mexican CMV, with no consideration of the reduction in the number of United States CMV that would be operating under the No Action Alternative conditions. Hence, the emissions reduction associated with the decrease in operations of United States CMV is not considered. Thus, the effect of the Presidential order to modify the moratorium is overestimated, since the actual increase in emissions would be lower than that calculated here.

Baseline — Moratorium Retained with Current Application Forms

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current application forms would not be revised. Mexico-domiciled CMC would use the existing Form OP-2 to apply for operating authority within the border zone, or the existing Form OP-1 (MX) to apply for operating authority beyond the border zone. With the moratorium in place, FMCSA would continue to be prevented from processing OP-1 (MX) applications, and thus Mexico-domiciled CMC would not receive authority to operate beyond the border zone.

The FMCSA estimates that there are approximately 4.5 million CMV currently operating throughout the United States, including United States, Canadian, and Mexican CMV. The total amount of emissions—for criteria pollutants—generated by the total number of CMV operating in the United States can be calculated from the values included in Table C-4. These values were obtained from the *National Air Quality and Emissions Trends Report, 1999*. No independent values are provided for CMV emissions in the report, so a conservative approach was used, and all emissions from heavy-duty gasoline vehicles and from diesel vehicles were attributed to CMV. Since not all diesel vehicles are CMV, the emissions numbers reported here overestimate actual CMV emissions. As discussed in Chapter 3, the two pollutants of concern for analyzing the environmental impact of the operation of CMV are NO_x and PM. Using the conservative assumptions stated above, the maximum amount of NO_x that would be emitted under Baseline conditions is 4,094,000 short tons, representing about 48 percent of all NO_x on-road

vehicle sources. The maximum amount of PM emissions that would be emitted is 201,000 short tons, representing about 68 percent of all on-road vehicle sources.

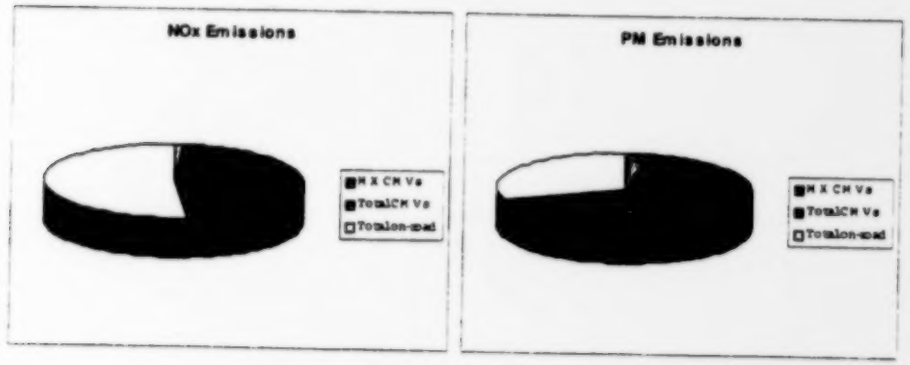
The FMCSA estimates that there are currently a maximum of 63,000 Mexican CMV operating in the United States under Baseline conditions within the border zone. FMCSA expects that approximately 10,800 Mexico-domiciled CMC would operate approximately 71,500 CMV within the border zone in FY2002, all pursuant to OP-2 authority. The total amount of emissions —for criteria pollutants—generated by the total number of Mexican CMV projected to operate within the border zone in FY2002 under Baseline conditions is shown in Table C-7 in Appendix C. The amount of NOx emitted under the Baseline conditions would be approximately 1 16,000 short tons or 1.4 percent of all on-road sources, and approximately half a percent of all national NO_x sources. The amount of PM emissions under Baseline conditions would be approximately 9,400 short tons or 3.2 percent of all on-road/highway sources, and less than a tenth of a percent of all national PM sources. Figure 4-1 shows the relative distribution of NOx and PM emissions for Mexican CMV, compared to those for all CMV—including United States and Canadian, and all other on-road sources. As shown in the figure, the contribution of emissions from Mexican CMV to the total for all CMV operating in the United States, and to all other on-road sources is relatively very small.

No-Action — Moratorium Modified with Current Application Forms

Under the No-Action Alternative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its current application forms OP-2

and OP-1 (MX) for Mexico-domiciled CMC. Under this alternative, Mexican CMV would operate within the border zone pursuant to OP-2 authority and throughout the United States pursuant to OP-1 (MX) authority.

Figure 4-1: Distribution of NO_x and PM Emissions from On-Road Sources and Mexican, United States and Canadian CMV, FY 2002 as a Percent of Weight



The FMCSA estimates that 11,000 Mexico-domiciled CMC would operate approximately 73,000 CMV within and beyond the border zone. FMCSA estimates that approximately 5,900 Mexico-domiciled CMC could operate under the current OP-2 authority and would operate approximately 39,000 CMV within the border zone. In addition, FMCSA estimates that approximately 5,100 Mexico-domiciled CMC would receive OP-1 (MX) authority and operate approximately 34,000 CMV beyond the border zone. These CMV would necessarily pass through the border zone to reach their destinations. Therefore, a portion of the emissions associated with the operation of those CMV operating pursuant to OP-1 (MX) authority would occur within the border zone. Thus, they are accounted for in the analysis of the air quality impacts of the No Action Alternative.

The analysis of potential air quality impacts was performed following the conservative rationale and assumptions explained at the beginning of this section. In order to evaluate the significance of the emissions from the operation of Mexican CMV, two different calculations were performed: one for the emissions within the border zone, also representative of all emissions in the United States from all Mexican CMV; and the other for those occurring beyond the border zone, representative of the emissions from those Mexican CMV operating pursuant to OP-1 (MX) authority. The emissions within the border zone were calculated under the assumption that the emissions of all 73,000 Mexican CMV would occur within the border zone, which is a conservative assumption since a portion of the emissions from the CMV operating pursuant to OP-1 (MX) authority would occur outside the border zone. The total amount of emissions—for criteria pollutants—generated by the total number of Mexican CMV that would operate within the border zone under the No Action Alternative—including those CMV passing through—is shown in Table C-8 in Appendix C.

As discussed in Chapter 3, the two pollutants of concern are NO_x and PM. The maximum amount of NO_x potentially emitted by Mexican CMV operating within the border zone under the No-Action Alternative would be approximately 117,000 short tons or 1.4 percent of all on-road sources and approximately half a percent of all national NO_x sources. This represents an increase of 3,000 short tons of NO_x compared to the Baseline scenario. The maximum amount of PM emissions within the border zone under the No-Action Alternative would be approximately 9,600 short tons or 3.3 percent of all on-road/highway sources, and less than a

tenth of a percent of all national PM sources. This represents an increase of approximately 200 short tons of PM compared to the Baseline scenario. This increase of about 2 percent represents the emissions change from the No Action Altemative as a result of the reduced number of OP-2 applicants, but including the CMC that would be applying for OP-l (MX) authority and operate beyond the border zone. Thus, the No Action Altemative could result in increased traffic of Mexican CMV in the border zone, with an associated increase in emissions from the operation of those Mexican CMV. This increase in emissions results in an insignificant impact to air quality, given its negligible contribution to all on-road and national emissions. In addition, as explained before, the increase in the number of Mexican CMV could be offset by a decrease in the number of United States CMV, so the increase in emissions should be significantly lower than that calculated above. Therefore, the No Action Alternative results in a very small contribution to air emissions within the border zone.

The amount of NO_x emitted beyond the border zone under the No Action Alternative would be approximately 55,000 short tons or 0.6 percent of all on-road sources and 0.2 percent of all national NO_x emissions. The amount of PM emissions beyond the border zone would be 4,500 short tons or 1.5 percent of all on-road sources and less than a tenth of a percent of all national PM emissions. These emissions would be offset by the reduction in emissions from those United States CMV that would be replaced by the Mexican CMV. Thus, the No Action Alternative would result in a very small contribution to air emissions beyond the border zone.

Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action Alternative, the Presidential order would modify the moratorium and FMCSA would revise its current applications OP-2 and OP-1 (MX) for Mexico-domiciled CMC. The revision of the application forms should improve FMCSA' s capability to determine the willingness and ability of Mexico-domiciled CMC to comply with United States safety standards and regulations. Under this alternative, Mexican CMV would operate within the border zone under the revised OP-2 authority and throughout the United States under the revised OP-1(MX) authority. The FMCSA estimates that approximately 10,900 Mexico-domiciled CMC would operate approximately 72,000 CMV within and beyond the border zone. FMCSA estimates that 5,800 Mexico-domiciled CMC would receive OP-2 authority and would operate approximately 38,000 CMV within the border zone. In addition, FMCSA estimates that 5,100 Mexico-domiciled CMC would receive OP-1 (MX) authority and operate approximately 34,000 CMV beyond the border zone.

Under the second rule, CMC intending to operate beyond the border zones under Form OP-1(MX) authority would be subject to a pre-authority safety audit, prior to receiving authority to operate within the United States FMCSA expects that this requirement should not affect the total number of Mexican CMV operating in the United States, or the number of inspections on those Mexican CMV.

The analysis of the significance of potential air quality impacts associated with the implementation of the applications part of the Proposed Action was performed following the conservative rationale and assumptions

presented in the beginning of this section. Thus, the reduction in the number of United States CMV resulting from their replacement by Mexican CMV is not considered, so the resulting calculations overestimate the actual change in emissions. In order to evaluate the significance of the emissions from the operation of Mexican CMV, two different calculations were performed: one for the emissions within the border zone, also representative of all emissions in the United States from all Mexican CMV; and the other for those occurring beyond the border zone, representative of the emissions from those Mexican CMV operating pursuant to OP-1 (MX) authority. The emissions within the border zone were calculated under the assumption that the emissions of all 72,000 Mexican CMV would occur within the border zone, which is a conservative assumption since a portion of the emissions from the CMV operating pursuant to OP-1 (MX) authority would occur outside the border zone. The total amount of emissions generated by the total number of Mexican CMV that would operate within the border zone under the proposed Action Alternative—including those CMV passing through—is shown in Table C-9 in Appendix C.

As discussed in Chapter 3, the two pollutants of concern are NO_x and PM. The maximum amount of NO_x potentially emitted by Mexican CMV within the border zone under the Proposed Action Alternative would be 117,000 short tons or 1.4 percent of all on-road sources and approximately half a percent of all national NOx sources. This represents a decrease of 2,000 short tons of NO_x compared to the No Action Alternative and an increase of 1,000 short tons compared to the Baseline Scenario. The maximum amount of PM emissions within the border zone under the Proposed Action Alternative would be approximately 9,500 short tons or 3.2 percent of all on-road sources and less than a tenth of a percent of all national PM sources. This represents a decrease of 100 short tons of PM compared to the No Action Alternative and an increase of 100 short tons compared to the Baseline Scenario. The increase in emissions relative to the Baseline Scenario is a result of increased trade under the No Action Alternative and not the implementation of the rules. The decrease in emissions of approximately 1 percent relative to the No Action Alternative represents the emissions change from the reduced number of Mexican CMV operating within the border zone that results from the implementation of the two rules revising Forms OP-2 and OP-1 (MX). However, as noted above, the Mexican CMV that would not operate in the United States would be replaced by United States CMV, thereby further reducing any potential air quality benefits associated with the implementation of the proposed rules. Therefore, the implementation of this part of the Proposed Action results in a very small reduction in air emissions within the border zone, relative to the No Action Alternative.

The amount of NO_x and PM emissions beyond the border zone under the Proposed Action Alternative would be approximately the same as that calculated under the No Action Alternative since the difference in the number of Mexican CMV operating beyond the border zone under both scenarios is indiscernible under the approximation conditions used in this analysis. Thus, the implementation of this part of the Proposed Action would result in no air quality impacts beyond the border zone relative to the No Action Alternative. The difference in emissions compared to the Baseline

Scenario would be very small relative to national levels of emissions, and would be a consequence of the increased trade under the No Action Alternative and not a result of the implementation of the revised Forms.

4.3.2 Safety Monitoring for Mexico-Domiciled Motor Carriers

To quantify the magnitude of direct pollutant emissions resulting from the inspections of Mexican CMV, the EPA emissions models, MOBILE5a and PART5, were used. MOBILE5a was used to determine emission factors for CO, VOC, and NO_x. PART5 was used to determine emission factors for Pb, $S0_2$, PM_{10}, and $PM_{2.5}$. For more detail on the methodology and data used for modeling please see Appendix C.

Baseline — Moratorium in place with Current Safety Monitoring Program

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current safety monitoring would not be revised. Eligible Mexico-domiciled CMC applying for operating authority would continue to receive permanent certificates of authority. Mexico-domiciled CMC would remain largely limited to operating within the border zone, so safety inspections of Mexican CMV should continue to occur predominantly within the border zone. Safety inspections would remain the primary tool used by Federal, State and local authorities to help ensure the safe operation of all CMV. Inspections on Mexican CMV would follow the same guidelines used for United States and Canadian CMV, and would not include verification of compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

FMCSA estimates that 2.77 million total CMV inspections would occur in the United States in 2002, with approximately 170,000 of these inspections involving Mexican CMV. All inspections would occur at existing facilities, and all inspections on Mexican CMV would occur in the border zone since they are only allowed to operate in that area. Roadside inspections take between 40 to 50 minutes with an engine-on-time (idle) of up to 15 minutes. Table C-10 in Appendix C shows the emissions calculations for the analysis of the current baseline conditions. The emissions resulting from the inspections represent a very small fraction of total emissions in the United States. Even when considering just the on-road vehicle emissions (not off-road or from other industries), the contribution from the inspections is still a very small fraction of these emissions. The main pollutants from cars, trucks, and buses that EPA targets for regulation are VOC, NO_x, CO, and PM. There have been great reductions of all these pollutants in the last 30 years.

As discussed in Chapter 3, NO_x and PM are the main pollutants of concern that EPA targets when analyzing emissions from heavy-duty vehicles. Current NO_x emissions were calculated to be approximately 2.74 short tons for 170,000 annual inspections of Mexican CMV, or $3.2x10^{-5}$ percent of all on-road emissions; and 44.[illegible] short tons for all 2.77 million inspections on all CMV in the United States, or $5.2x10^{-4}$ percent of all on-road emissions. PM emissions were calculated at 0.17 short tons or $5.9x10^{-5}$ percent of all on-road emissions in the U.S from 170,000 inspections on Mexican CMV; and 2.84 short tons for all 2.77 million inspections on all CMV in the United States, or $9.6x10^{-4}$ percent of all on-road emissions. The contribution of emissions from

inspections on CMV—Mexican, Canadian, and United States—to total on-road emissions is negligible. Considering these results and the conservatism of the data and assumptions used in the analysis, the effects on air quality in the United States under the current inspection schedule should be negligible.

No-Action — Moratorium Modified with Current Safety Monitoring Program

Under the No Action Alternative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would continue to receive permanent certificates of authority. Mexico-domiciled CMC would be eligible to operate beyond the border zone, so safety inspections of Mexican CMV would occur within and beyond the United States-Mexico border zone. Safety inspections would remain the primary tool used by Federal, State and local authorities to help ensure the safe operation of all CMV. Inspections on Mexican CMV would follow the same guidelines used for United States and Canadian CMV, and would not include verification of compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

FMCSA estimates that 2.78 million total CMV inspections would occur in the United States in 2002, with approximately 180,000 of these inspections involving Mexican CMV. All inspections would continue occurring at existing facilities. The number of inspections on Mexican CMV should be slightly larger than under the Baseline scenario, but would occur throughout the United States and would not be limited to the border

zone as is currently the case. However, all CMV operating beyond the border zone will necessarily pass through the border zone to reach their destinations and points of origin. Thus, a conservative approach was used, and it was assumed that all emissions from inspections of Mexican CMV would occur within the border zone, thereby calculating the maximum potential air quality impact of the No Action Alternative. Roadside inspections take between 40 to 50 minutes with an engine-on-time (idle) of up to 15 minutes. Table C-11 in Appendix C shows the emissions calculations for the analysis of the No Action Alternative. The calculations were performed using the same methodology and assumptions used in the Baseline Scenario. The emissions resulting from the inspections represent a very small percentage of total on-road emissions in the United States.

As discussed in Chapter 3, NO_x and PM are the main pollutants of concern that EPA targets when analyzing emissions from heavy-duty vehicles. Current NO_x emissions were calculated to be 2.89 short tons for 180,000 annual inspections of Mexican CMV, or $3.4x10^{-5}$ percent of all on-road emissions; and 44.8 short tons for all 2.78 million inspections on all CMV in the United States, or $5.2x10^{-4}$ percent of all on-road emissions. PM emissions were calculated at 0.19 short tons or $6.3x10^{-5}$ percent of all on-road emissions in the U.S from 180,000 inspections on Mexican CMV; and 2.85 short tons for all 2.78 million inspections on all CMV in the United States, or $1.0x10^{-3}$ percent of all on-road emissions. The contribution of emissions from inspections on CMV—Mexican, Canadian, and United States—to total on-road emissions is negligible. Considering these results and the conservatism of the data/assumptions used in

the analysis, the effects on air quality in the United States under the current inspection schedule are negligible.

Under the No Action Alternative there would be an increase of 0.16 short tons of NO_x emitted when compared to the emissions from Mexican CMV under the Baseline scenario. The amount of PM emitted from Mexican CMV inspections would be 0.01 short tons more under the proposed action compared to the Baseline scenario. This represents an emissions increase of less than half a percent in NO_x and PM emissions from all CMV inspections as a result of the Presidential order to modify the moratorium. The emissions increase is a result of the increase in the number of Mexican CMV that could be inspected under the No Action Alternative as a response to the increase in traffic of Mexican CMV within the United States. This increase in emissions represents a negligible fraction of total on-road emissions. Considering these results and the conservatism of the data and assumptions used in the analysis, the increase in air emissions under the No Action Alternative represents a very small contribution to air emissions within the border zone and throughout the United States.

Proposed Action — Moratorium Modified with Revised Safety Monitoring Program for Mexico-Domiciled Motor Carriers

Under the Proposed Action Alternative, a Presidential order would modify the moratorium and FMCSA would promulgate two rules to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would receive provisional authority for a period of no less than 18 months. As under the No Action Alternative, Mexico-domiciled CMC would be

eligible to operate beyond the border zone, so safety inspections of Mexican CMV would occur both at the U.S-Mexico border and at other inspection locations throughout the United States. All Mexico-domiciled CMC, including carriers with current certificates of authority, would be required to re-apply using the revised application forms set forth in the first two rules. In addition to the safety inspections used by Federal, State and local authorities, FMCSA would also conduct at least one safety audit or compliance review while a carrier was operating under a provisional authority. Both the safety inspections and the safety audit would be used as tools to help ensure the safe operation of Mexican CMV. Inspections on Mexican CMV would follow the same guidelines used for United States and Canadian CMV, and would include verification of compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States. would continue to be inspected approximately two to three times per year on average.

The inspection schedule would be the same than that under the No Action Alternative. Since there would be the same number of inspections on Mexican CMV, the total number of inspections on all CMV also remains the same. As in the No Action Alternative, these inspections could occur anywhere in the United States. and would not be limited to the border zone. Since these inspections include verification of FMVSS compliance, they will be approximately 5 seconds longer, or about a fifth of a percent longer than those inspections considered under the No Action Alternative and Baseline scenario. The increase in emissions from this added time was calculated and considered negligible due to its insignificant contribution to emissions from all inspec-

tions and to emissions from all on-road sources at the national level (see Table C-11 in Appendix C). Thus, the implementation of the revised Safety monitoring program should have no impacts to air quality, relative to the No Action Alternative.

Commercial Vehicle Safety Alliance Decal - Proposed Requirement:

Under the Proposed Action, FMCSA could implement a CVSA requirement, under which Mexico-domiciled CMC granted provisional operating authority under Form OP-1 (MX) would be required to maintain a current CVSA decal on all their CMV operating within the United States. In addition, CMC would be required to maintain current CVSA decal on their CMV for three years after receiving permanent OP-1 (MX) authority. FMCSA estimates that this requirement could result in 230,000 Mexican CMV inspections in 2002. The additional inspections are necessary to meet the CVSA requirement of four yearly inspections for Mexican CMV operating pursuant to OP-1 (MX) authority. It was assumed that the average number of inspections per Mexican CMV operating pursuant to OP-2 authority would be the same as that under the Proposed Action and No Action scenarios. This should result in an increase in the number of Mexican CMV inspections compared to the No Action Alternative and the Baseline scenario. Thus, the total number of CMV inspections in the United States should be 2.83 million. These inspections would occur at existing roadside inspection stations or other existing facilities where CVSA decal inspections currently take place.

Table C-12 in Appendix C shows the impact on emissions from the 230,000 inspections on Mexican CMV. The calculations were performed using the same meth-

odology and assumptions used in the Proposed Action Alternative, including consideration of the slight increment in time for inspection due to the FMVSS requirement. The emissions resulting from the inspections represent a very small percentage of total on-road emissions in the United States. As discussed in Chapter 3, NO_x and PM are the main pollutants of concern that EPA targets when analyzing emissions from heavy-duty vehicles. Projected NO_x emissions were calculated to be approximately 3.7 short tons for 230,000 annual inspections of Mexican CMV, or 4.3×10^{-5} percent of all on-road emissions; and 45.6 short tons for all 2.83 million inspections on all CMV in the United States, or 5.3×10^{-4} percent of all on-road emissions. PM emissions were calculated at 0.24 short tons or 8.0×10^{-5} percent of all on-road emissions in the U.S from 230,000 inspections on Mexican CMV; and 2.91 short tons for all 2.83 million inspections on all CMV in the United States, or 1.0×10^{-3} percent of all on-road emissions.

Under this requirement, there would be an increase of approximately 30 percent on emissions from inspections on Mexican CMV and an increase of approximately 2 percent on emissions from all CMV, relative to the Proposed Action and No Action Alternatives. However, the contribution of emissions from inspections on all CMV nationwide to total on-road emissions is negligible. Considering these results and the conservatism of the data/assumptions used in the analysis, the effects on air quality in the United States under the proposed inspection schedule should be negligible.

4.3.3 Summary of Impacts of the Proposed Action on Air Quality

No-Action — Moratorium Modified with Current Application Forms and Current Safety Monitoring Program

The potential air quality impacts of the No Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program. The No Action Alternative could result in a maximum increase in NOx and PM emissions from the operation and inspection of Mexican CMV of approximately 2 to 3 percent when compared to the emissions calculated under the Baseline Scenario. The contribution of these emissions compared to nationwide emissions from all on-road sources is negligible. In addition, these minor emissions increases could be further reduced by the offset from the reduction in the emissions associated with those United States CMV trips replaced by trips carried out by some of the new entrant Mexican CMV operating within the United States. Thus, the No Action Alternative could result in very minor contributions to air emissions in the United States.

Proposed Action — Moratorium Modified with Revised Application Forms and Revised Safety Monitoring Program

The potential air quality impacts of the Proposed Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program (including implementation of the CVSA requirement). The calculated emission levels were compared to those calculated under the Baseline Scenario and No Action

Alternative. When compared to the Baseline Scenario, the Proposed Action could result in a maximum increase in NO_x and PM emissions from the operation and inspection of Mexican CMV of approximately 1 percent. When compared to the No Action Alternative, the Proposed Action could result in a decrease in NO_x and PM emissions of approximately 1 to 2 percent. Thus, although there is a slight increase in the emissions of NOx and PM when considering the combined effect of the No Action Alternative and the implementation of the Proposed Action, this increase is a result of the No Action Alternative and not the Proposed Action itself. In fact, the Proposed Action results in a slight reduction in emissions. Therefore, the implementation of the Proposed Action could result in a very minor reduction in air emissions in the United States. The changes in resulting emissions are negligible when compared to national levels of emissions for the operations of CMV, all on-road sources, and total emissions from all sources.

4.4. NOISE

Given detailed operational and site information regarding individual inspection stations throughout the United States, a site-specific analysis of noise impacts would be possible using the methodology outlined in Appendix E. With less detailed information the analysis of inspection noise impacts is limited to generalizations and order-of-magnitude approximations. It is important to note, however, that in all noise analyses presented herein, assumptions are made such that any potential error is on the conservative (i.e., predicting greater noise levels) than would actually occur.

An example of site-specific analysis follows. For a given inspection station, suppose that the nearest

residential dwelling is located 100 ft from the inspection site. Given this proximity, as well as other assumptions outlined in Appendix E, FHWA regulations allow for up to 171 hourly heavy truck inspections at this site prior to consideration of noise mitigation measures. If the closest dwelling were located 200 ft from the site, up to 319 hourly operations would be permissible. In addition to the details presented in this section, FHWA regulations necessitate the analysis of project sound levels with respect to existing ambient sound levels; see Appendix E. Given that inspection stations are already situated alongside roads and highways, it is likely that project sound levels will not require noise mitigation based on these criteria.

Conversely, if one knew the actual total operations at a given inspection station, it would then be possible to determine the minimum distance between the station and a residential dwelling that did not result in impact per FHWA regulations. A worst-case scenario follows. This analysis utilizes as a given the FMCSA-estimated yearly total inspections under each of the three scenarios (baseline, no action, and proposed action), the potential for inspections 235 days per year (weekdays only with 25 extra days off for bad weather and holidays), 7 hours of inspections per day (8-hour work day with 1 hour off for lunch) and a potential 200 inspection stations in states bordering Mexico. The analysis is conservative in that: (1) inspections may occur more than 235 days of the year (thus distributing the resultant noise over a longer time period), (2) inspections may occur any time during a 24-hour day (resulting in lower hourly-average sound levels), (3) inspections may potentially occur anywhere within the United States, as opposed to only within border states and at fixed

inspection stations. Given the above-outlined scenario, on average one would expect approximately 7 hourly inspections, which indicates mitigation measures need only be considered for residential dwellings within 30 feet of the inspection station, per FHWA impact criteria.

It should be noted that the numbers of Mexican CMV identified for analysis herein (between approximately 71,500 and 73,000 vehicles for the various scenarios outlined below) represent less than 2% of the total number of such vehicles currently estimated to operate within the United States. While it is difficult to quantify potential noise impacts of such vehicles over an expanse of area such as the United States, intuitively the contribution of noise is relatively small when compared to the overall population of CMV. Further, given the conservative nature of the assumptions made in deriving the following scenarios, actual sound levels would be typically very low.

4.4.1 Applications for Operating Authority

Potential noise impact assessments utilize heavy trucks operating at a representative average speed of 40 mph. The FHWA's Traffic Noise Model (TNM) was utilized to model hourly equivalent sound levels for sound propagation over an acoustically hard surface. Further, worst-case scenarios were developed using the following assumptions: (1) that all United States-Mexico border crossings occur at the seven ports of entry identified in Chapter 3 (Laredo, Otay Mesa, El Paso, Brownsville, Hidalgo, Nogales, and Calexico); and (2) that each CMC utilizes approximately 6.63 CMV. Accordingly, total FMCSA CMC estimates were scaled by this factor of 1/7 for noise analyses at a single, "worst-case" site.

Baseline — Moratorium Retained with Current Application Forms

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current application forms would not be revised. Mexico-domiciled CMC would use the existing Form OP-2 to apply for operating authority within the border zone, or the existing Form OP-1 (MX) to apply for operating authority beyond the border zone. With the moratorium in place, FMCSA would continue to be prevented from processing OP-1 (MX) applications, and thus Mexico-domiciled CMC would not receive authority to operate beyond the border zone.

The FMCSA estimates that there are approximately 4.5 million CMV currently operating throughout the United States, including United States, Canadian, and Mexican CMV. The FMCSA estimates that there are approximately of 63,000 Mexican CMV operating in the United States under Baseline conditions within the border zone. FMCSA expects that 10,800 Mexico-domiciled CMC could operate a maximum of 71,500 CMV within the border zone in FY2002, all pursuant to OP-2 authority. Using the scaling factor highlighted above, an estimated 10,300 (conservatively rounding up the calculated 10,214) Mexican CMV may potentially cross the border at one crossing. In order to be very conservative, it was further assumed that all 10,300 vehicles hypothetically crossing each location would do so within the same hour. Using these assumptions, the TNM predicts hourly equivalent sound levels of 76.6 dBA at a distance of 900 feet. Given the extremely conservative nature of the assumptions and the calculated noise levels, the baseline scenario would result in indistinguishable contributions to noise levels.

No Action — Moratorium Modified with Current Application Forms

Under the No-Action Alternative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its current application forms OP-2 and OP-1 (MX) for Mexico-domiciled CMC. Under this alternative, Mexican CMV would operate within the border zone pursuant to OP-2 authority and throughout the United States pursuant to OP-1 (MX) authority.

The FMCSA estimates that 11,000 Mexico-domiciled CMC could operate approximately 73,000 CMV within and beyond the border zone. FMCSA estimates that 5,900 Mexico-domiciled CMC could operate under the current OP-2 authority and could operate a maximum of 39,000 CMV within the border zone. In addition, FMCSA estimates that 5,100 Mexico-domiciled CMC would receive OP-1 (MX) authority and operate 34,000 CMV beyond the border zone. These CMV would necessarily pass through the border zone to reach their destinations. Therefore, it is assumed that a seventh of all 73,000 Mexican CMV—or 10,500 (conservatively rounding up the calculated 10,428) Mexican CMV—could pass through a location within the same hour. The TNM predicts hourly equivalent sound levels of 76.6 dBA at a distance of 900 feet. Thus, the No Action Alternative results in no change in noise levels relative to the Baseline scenario. Thus, the No Action Alternative would result in no noise impacts.

Beyond the border zone, assume that a seventh of all 34,000 Mexican CMV—or 4,900 (conservatively rounding up the calculated 4,857) Mexican CMV—operating pursuant to OP-1 (MX) authority could pass through a location within the same hour. The TNM predicts hourly equivalent sound levels of 73.3 dBA at a distance

of 900 feet. In addition, the increase in the number of Mexican CMV would be offset by a decrease in the number of United States CMV traveling the same routes. Thus, the No Action Alternative would result in a very minor increase in noise levels beyond the border zone relative to the Baseline scenario. Given the extremely conservative nature of the assumptions and the calculated noise levels, the No Action Alternative would result in negligible contributions to noise levels.

Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action Alternative, the Presidential order would modify the moratorium and FMCSA would revise its current applications OP-2 and OP-1(MX) for Mexico-domiciled CMC. The revision of the application forms will improve FMCSA' s capability to determine the willingness and ability of Mexico-domiciled CMC to comply with United States safety standards and regulations. Under this alternative, Mexican CMV would operate within the border zone under the revised OP-2 authority and throughout the United States under the revised OP-1 (MX) authority.

Under the second rule, Mexican CMC seeking to operate beyond the border zones pursuant to Form OP-1 (MX) authority would be subject to a pre-authority safety audit, prior to receiving authority to operate within the United States FMCSA expects that this requirement should not affect the total number of Mexican CMV operating in the United States, nor the number of inspections on those Mexican CMV. This alternative should create a more stringent screening process for applicants that should improve the ability of the FMCSA to deny entry to the highest risk Mexico-domiciled CMC, thereby reducing the number of CMV

in operation. This should result in a reduction of noise emissions by eliminating the impacts associated with operating and inspecting those vehicles. Quantitative estimates of the noise reductions resulting from this supplemental alternative are at best difficult to calculate due to the lack of data on the actual number of Mexican CMV that would be denied authority to operate in the United States. However, with a reduced number of inspections of Mexican vehicles, the total number of inspections should remain within the operating limits initially established for the inspection stations. Implementation of this requirement should result in a minor reduction compared to the No Action Alternative.

The FMCSA estimates that 10,900 Mexico-domiciled CMC could operate a maximum of 72,000 CMV within and beyond the border zone. FMCSA estimates that 5,800 Mexico-domiciled CMC could operate under the current OP-2 authority and could operate 38,000 CMV within the border zone. In addition, FMCSA estimates that 5,100 Mexico-domiciled CMC could receive OP-1(MX) authority and operate a maximum of 34,000 CMV beyond the border zone. These CMV may necessarily pass through the border zone to reach their destinations. Therefore, it is assumed that a seventh of all 72,000 Mexican CMV—or 10,300 (conservatively rounding up from the calculated 10,286) Mexican CMV - could pass through a location within the same hour. The TNM predicts hourly equivalent sound levels of 76.6 dBA at a distance of 900 feet. In addition, the increase in the number of Mexican CMV would be offset by a decrease in the number of United States CMV traveling the same routes. Thus, the Proposed Action Alternative results in minor reduction in noise

levels relative to the No Action Alternative and no change from the Baseline scenario.

Beyond the border zone, there should be no changes relative to the No Action Alternative in the approximate number of CMV operating pursuant to OP-1 (MX) authority and potentially passing through a location within the same hour. Accordingly, the TNM predicts hourly equivalent sound levels of 73.3 dBA at a distance of 900 feet. Thus, the implementation of the two revised forms results in no change in sound levels beyond the border zone relative to the No Action Alternative, and thereby in no noise impacts.

4.4.2 Safety Monitoring Program for New Applicants

Baseline — Moratorium in place with Current Safety Monitoring Program

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current safety monitoring would not be revised. Eligible Mexico-domiciled CMC applying for OP-2 authority would continue to receive permanent certificates of authority. Mexico-domiciled CMC would remain largely limited to operating within the border zone, so safety inspections of Mexican CMV would continue to occur predominantly within the border zone. Safety inspections would remain the primary tool used by Federal, State and local authorities to help ensure the safe operation of all CMV. Inspections on Mexican CMV would follow the same guidelines used for United States and Canadian CMV, and would not include verification of compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

Based on current and projected number of inspections on Mexican CMV and the expected increase from the addition of inspectors to work along the United States-Mexico border, FMCSA estimates that 2.77 million total CMV inspections would occur in the United States in 2002, with approximately 170,000 of these inspections involving Mexican CMV. All inspections would occur at existing facilities, and all inspections on Mexican CMV would occur in the border zone since they are only allowed to operate in that area. Roadside inspections take between 40 to 50 minutes with an engine-on-time (idle) of up to 15 minutes. During this time, noise emissions could potentially affect that area. However, the number of inspections will remain within the operating limits initially established for the inspection stations. Thus, the Baseline scenario will result in no noise impacts.

No-Action — Moratorium Modified with Revised Safety Monitoring Program

Under the No Action Alternative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would continue to receive permanent certificates of authority. Mexico-domiciled CMC would be eligible to operate beyond the border zone, so safety inspections of Mexican CMV would occur within and beyond the United States-Mexico border zone. Safety inspections would remain the primary tool used by Federal, State and local authorities to help ensure the safe operation of all CMV. Inspections on Mexican CMV would follow the same guidelines used for United States and Canadian CMV, and would not include verification of compliance with the FMVSS labeling

requirement. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

The FMCSA estimates that 2.78 million CMV inspections would occur in the United States, with 180,000 of these inspections involving Mexican vehicles. All inspections would occur at existing facilities, and the inspections on Mexican CMV would occur within and beyond the border zone. Since all Mexican CMV would necessarily pass through the border zone to reach their destinations, they could be inspected within the border zone. Thus, since the actual geographic distribution of inspections is unknown, this analysis assumes that all 180,000 inspections on Mexican CMV could occur within the border zone. However, both within and beyond the border, the number of inspections would remain within the operating limits initially established for the inspection stations. Therefore, the No Action Alternative would result in no noise impacts from the inspection of Mexican CMV within and beyond the border zone.

Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action Altemative, a Presidential order would modify the moratorium and FMCSA would promulgate two rules to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would receive provisional authority for a period of no less than 18 months. As under the No Action Alternative, Mexico-domiciled CMC would be eligible to operate beyond the border zone, so safety inspections of Mexican CMV would occur both at the U.S-Mexico border and at other inspection locations throughout the United States. All Mexico-domiciled CMC, including carriers with current certificates of

authority, would be required to re-apply using the revised application forms set forth in the first two rules. In addition to the safety inspections used by Federal, State and local authorities, FMCSA would also conduct at least one safety audit or compliance review while a carrier was operating under provisional authority. Both the safety inspections and the safety audit would be used as tools to help ensure the safe operation of Mexican CMV. Inspections on Mexican CMV would follow the same guidelines used for United States and Canadian CMV, and would include verification of compliance with the FMVSS labeling requirement. Mexican CMV operating in the United States would continue to be inspected approximately two to three times per year on average.

The inspection schedule would be the same as under the No Action Alternative. Since there would be the same number of inspections on Mexican CMV, the total number of inspections on all CMV would remain the same. As in the No Action Altemative, these inspections would occur at existing facilities and would not be limited to the border zone. Since these inspections would include verification of FMVSS compliance, they will be approximately 5 seconds longer, or about a fifth of a percent longer than those inspections considered under the No Action Alternative and Baseline scenario. This would essentially have negligible effects on noise levels.

<u>Commercial Vehicle Safety Alliance Decal - Proposed Requirement:</u>

Under this requirement, all Mexico-domiciled CMC granted provisional operating authority under Form OP-1 (MX) would be required to maintain a current CVSA decal on all their CMV operating within the

United States. In addition, CMC would be required to maintain current CVSA decals on their CMV for three years after receiving permanent OP-1 (MX) authority. FMCSA estimates that this requirement could result in 230,000 Mexican CMV inspections in 2002. The additional 50,000 inspections are necessary to meet the CVSA requirement of four yearly inspections for Mexican CMV operating pursuant to OP-1 (MX) authority. It was assumed that the average number of inspections per Mexican CMV operating pursuant to OP-2 authority would be the same than that under the Proposed and No Action scenarios. Thus, the total number of CMV inspections in the United States should be 2.83 million. These inspections would occur at existing roadside inspection stations or other existing facilities where CVSA decal inspections currently take place. These inspections would include verification of the FMVSS label so would be just as long as those under the Proposed Action.

Since all Mexican CMV would necessarily pass through the border zone to reach their destinations, they could be inspected within the border zone. Thus, since the actual geographic distribution of inspections is unknown, this analysis assumes that all 230,000 inspections on Mexican CMV could occur within the border zone. However, both within and beyond the border, the number of inspections would remain within the operating limits initially established for the inspection stations. Therefore, the implementation of the CVSA requirement would result in indistinguishable noise impacts from the inspection of Mexican CMV within and beyond the border zone.

4.4.3 Summary of Impacts of the Proposed Action on Noise

No Action — Moratorium Modified with Current Application Forms and Current Safety Monitoring Program

The potential noise impacts of the No Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program. The No Action Alternative could result in an increase in the number of Mexican CMV operating and being inspected in the United States relative to the Baseline Scenario, with an associated potential increase in noise. However, the contribution of these noise increases compared to noise emissions from operations and inspections on all CMV, and in particular to total on-road emissions, is negligible. In addition, these minor increases in the number of Mexican CMV operating within the United States could be further reduced by a reduction in the operations associated with those United States CMV trips replaced by trips carried out by some of the new entrant Mexican CMV operating within the United States. Furthermore, inspections on Mexican CMV would no longer be restricted to the border zone but could occur anywhere in the United States. Thus, the No Action Alternative could result in negligible contributions to noise emissions in the United States.

Proposed Action — Moratorium Modified with Revised Application Forms and Revised Safety Monitoring Program

The potential noise impacts of the Proposed Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority,

and safety monitoring program (including implementation of the CVSA requirement). The resulting numbers of Mexican CMV operating and being inspected were compared to those calculated under the Baseline Scenario and the No Action Alternative. When compared to the Baseline Scenario, the Proposed Action could result in a marginal increase in the number of Mexican CMV operating in the United States. In addition, there could be a significant increase in the number of inspections on Mexican CMV. When compared to the No Action Alternative, the Proposed Action could result in a marginal decrease in the number of Mexican CMV operating within the United States. In addition, there could be a significant increase in the number of inspections on Mexican CMV.

Although there is a slight increase in the number of Mexican CMV operating within the United States compared to the Baseline, this change is negligible when compared to national operations of CMV. In addition, the increased number of inspections and longer inspections would not result in identifiable changes in sound levels. Thus, given the estimated number of Mexican CMV operating and being inspected, the implementation of the Proposed Action would result in no noise impacts.

4.5. SOCIOECONOMICS

This section addresses the potential effects on socioeconomics from the current Baseline Scenario, the No Action Alternative and the Proposed Action. Impacts from the rules on socioeconomics and environmental justice are identified where appropriate.

4.5.1 Applications for Operating Authority

Baseline — Moratorium Retained with Current Application Forms

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current application forms would not be revised. Mexico-domiciled CMC would use the existing Form OP-2 to apply for operating authority within the border zone, or the existing Form OP-1 (MX) to apply for operating authority beyond the border zone. With the moratorium in place, FMCSA would continue to be prevented from processing OP-1 (MX) applications, and thus Mexico-domiciled CMC would not receive authority to operate beyond the border zone.

The FMCSA estimates that there are approximately 4.5 million CMV currently operating throughout the United States, with a maximum of 63,000 Mexican CMV operating within the border zone. FMCSA estimates that under the baseline scenario, there could be a maximum of 71,500 Mexican CMV operating pursuant to OP-2 authority in FY2002. Any potential impacts associated with these operations should be concentrated in the border zone as Form OP-2 restricts operations to a 20-mile radius from the border (FMSCA 2001c). According to 2000 census data, 4.8 million people live in the seven counties adjacent to the busiest border crossings, with over half of those people living in San Diego County adjacent to the Otay Mesa crossing. Of the people living adjacent to these seven crossings, 50% identified themselves as being of Hispanic or Latino origin (83% if San Diego County is excluded). San Diego County had a median household income of $39,427 (See Appendix G for more demographic and socioeconomic data) and the remaining counties had

median household incomes that ranged from $20,034 to $26,515. During the same period, the total United States population was 281.4 million with 12.5% identifying themselves as being of Hispanic or Latino origin. The median household income throughout the United States was $37,005 (United States Census Bureau 2001). Given this information, the current border zone activities—and their effects—could be disproportionately impacting Hispanic and Latino communities as well as low-income communities in the border counties.

No Action — Moratorium Modified with Current Application Forms

Under the No-Action Alternative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its current application forms OP-2 and OP-1(MX) for Mexico-domiciled CMC. Under this alternative, Mexican CMV would operate within the border zone pursuant to OP-2 authority and throughout the United States pursuant to OP-1 (MX) authority. The FMCSA estimates that 11,000 Mexico-domiciled CMC could operate approximately 73,000 CMV within and beyond the border zone. FMCSA estimates that approximately 5,900 Mexico-domiciled CMC could operate 39,000 CMV under the current OP-2 authority. In addition, FMCSA estimates that approximately 5,100 Mexico-domiciled CMC could receive OP-1 (MX) authority and operate approximately 34,000 CMV beyond the border zone. These CMV should necessarily pass through the border zone to reach their destinations. Therefore, all 73,000 Mexican CMV could travel within and/or through the border zone.

Thus, under the No Action altemative, there could be an increase of approximately 1,500 Mexican CMV with authority to operate in the border zone, compared to

the Baseline. In addition, as discussed in Chapter 2, the modification of the moratorium may cause a slight increase in the total amount of goods imported into the United States from Mexico. This modest increase in trade and in the total number of Mexican CMV with authority to operate in the United States should result in an economic benefit to the communities in the border zone. This economic benefit would be offset by a decrease in the use of transfer stations within the border zone, as Mexico-domiciled CMC begin transporting goods directly from Mexico to their final destinations beyond the border zone. It is difficult to quantify effects from each of these factors; however, the overall economic impact within the border zone, whether beneficial or adverse, is expected to be small.

Beyond the border zone, the FMCSA anticipates that Mexican CMV would travel throughout the United States, and that their travel would not be limited to specifically identifiable areas. Thus, since the impacts associated with Mexico-domiciled CMC operations would be spread throughout the United States, no single area or community would be disproportionately impacted, and negative socioeconomic impacts beyond the border zone would be minor.

Proposed Action — Moratorium Modified with Revised Application Forms

Under the Proposed Action Alternative, the Presidential order would modify the moratorium and FMCSA would revise its current applications OP-2 and OP-1 (MX) for Mexico-domiciled CMC. The revision of the application forms will improve FMCSA' s capability to determine the willingness and ability of Mexico-domiciled CMC to comply with United States safety standards and regulations. Under this altemative,

Mexican CMV would operate within the border zone under the revised OP-2 authority and throughout the United States under the revised OP-1 (MX) authority. Under the second rule, Mexican CMC seeking to operate beyond the border zones pursuant to Form OP-1(MX) authority would be subject to a pre-authority safety audit, prior to receiving authority to operate within the United States.

The FMCSA estimates that approximately 10,900 Mexico-domiciled CMC could operate approximately 72,000 CMV within and beyond the border zone. FMCSA estimates that 5,800 Mexico-domiciled CMC could operate under the current OP-2 authority and could operate approximately 38,000 CMV within the border zone. In addition, FMCSA estimates that 5,100 Mexico-domiciled CMC could receive OP-1 (MX) authority and operate approximately 34,000 CMV beyond the border zone. These CMV could necessarily pass through the border zone to reach their destinations and to retum to Mexico. Therefore, all 72,000 Mexican CMV could travel within and/or through the border zone.

Thus, under the Proposed Action Alternative, there could be decrease of approximately 1,000 Mexican CMV with authority to operate in the border zone, compared to the No Action Alternative, and an increase of 500 Mexican CMV compared to the Baseline. As discussed in Chapter 2, the proposed rules are not expected to increase the total amount of goods imported into the United States from Mexico. The decrease in the total number of Mexican CMV with authority to operate in the United States compared to the No Action Alternative, should be offset by an increase in the number of trips made by existing Mexican CMV since the overall

volume of trade should not be affected by the Proposed Action. In addition, fewer Mexico-domiciled CMC would transport goods directly from Mexico to final destinations within the United States, mitigating this adverse economic impact to the border zone from the No Action Alternative. It is difficult to quantify the effects from each of these factors; however, the overall economic impact within the border zone, whether beneficial or adverse, is expected to be small. This conclusion applies to a comparison of economic impacts between the Proposed Action alternative and either the No Action or Baseline

Beyond the border zone the implementation of the Proposed Action results in a reduction of 110 Mexican CMV operating pursuant to OP-1 (MX) authority, when compared to the number operating under the No Action Alternative. The level of safety would be improved, as the reduction in vehicles should be the result of the FMCSA denying authority to high-risk CMC. Thus, the revision of Forms OP-2 and OP-1(MX) could reduce the impacts associated with increased border traffic resulting from the No Action Alternative. Therefore, low income and Hispanic/Latino communities living beyond the border zones could benefit from this part of the Proposed Action, and would not be disproportionately affected by its implementation.

4.5.2 Safety Monitoring for Mexico-Domiciled Motor Carriers

Baseline — Moratorium Retained with Current Safety Monitoring Program

Under a continuation of the current baseline operating conditions, the moratorium would remain unmodified and the current safety monitoring would not be revised. Eligible Mexico-domiciled CMC applying for operating

authority would continue to receive permanent authority. Mexico-domiciled CMC would remain largely limited to operating within the border zone, so safety inspections of Mexican CMV would continue to occur predominantly within the border zone. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

Based on current and projected number of inspections on Mexican CMV and the expected increase from the addition of inspectors to work along the United States-Mexico border, FMCSA estimates that 2.77 million total CMV inspections could occur in the United States in 2002, with approximately 170,000 of these inspections involving Mexican CMV. These roadside inspections take between 40 to 50 minutes. Since the inspection process at fixed locations involves choosing CMV out of the lines for the weigh stations, at a rate of one CMV per inspection area at a time, the potential effects at and around the inspection stations are minimized. In addition, FMCSA anticipates that all non-Mexican CMV inspections will continue to occur at any of the State and Federal inspection stations located throughout the United States and will not be concentrated in any particular area. Inspections on Mexican CMV would largely occur within the border zone.

No-Action — Moratorium Modified with Current Safety Monitoring Program

Under the No Action Altemative, a Presidential order would modify the moratorium and FMCSA would take no action to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would continue to receive permanent authority. Mexico-domiciled CMC would be eligible to operate beyond the border zone, so safety inspections of

Mexican CMV would occur within and beyond the United States Mexico border zone. Mexican CMV operating in the United States would be inspected approximately two to three times per year on average.

FMCSA expects that the proportion of Mexican CMV inspected would increase as the number of Mexican CMV operating in the United States increases. In addition, FMCSA will continue to deploy additional inspectors at the border, as described under the Baseline Scenario. FMCSA estimates that 2.78 million total CMV inspections would occur in the United States in 2002, with approximately 180,000 of these inspections involving Mexican CMV. All inspections would continue occurring at existing facilities. The number of inspections on Mexican CMV could be slightly larger than under the current baseline conditions, but could occur anywhere in the United States and would not be limited to the border zone as is currently the case. Thus, no single area or community would be disproportionately impacted, since these inspections will occur at any of the State and Federal inspection stations located throughout the United States and will not be concentrated in any particular area. Therefore, the No Action Alternative could have a minor beneficial impact to socioeconomics in the border zone. However, the significance of this benefit is expected to be minor and is at best difficult to quantify since there is no data on the expected geographic distribution of inspections on Mexican CMV. In addition, the total number of inspections in the United States would increase only marginally, so there would be no impacts on socioeconomics from the No Action Alternative.

Proposed Action — Moratorium Modified with Revised Safety Monitoring Program for Mexico-Domiciled Motor Carriers

Under the Proposed Action Alternative, a Presidential order would modify the moratorium and FMCSA would promulgate two rules to revise its safety monitoring program. Eligible Mexico-domiciled CMC applying for operating authority would receive provisional authority for a period of no less than 18 months. As under the No Action Alternative, Mexico-domiciled CMC would be eligible to operate beyond the border zone, so safety inspections of Mexican CMV would occur both at the U.S-Mexico border and at other inspection locations throughout the United States. All Mexico-domiciled CMC, including carriers with current certificates of authority, would be required to re-apply using the revised application forms set forth in the first two rules. In addition to the safety inspections used by Federal, State and local authorities, FMCSA would also conduct at least one safety audit or compliance review while a carrier was operating under a provisional certificate of authority. Mexican CMV operating in the United States would continue to be inspected approximately two to three times per year on average. These inspections would include verification of compliance with the FMVSS labeling requirement.

The inspection schedule would be the same as under the No Action Alternative and the total number of inspections on all CMV also should remain the same. As in the No Action Alternative, these inspections could occur anywhere in the United States and would not be limited to the border zone. Since these inspections include verification of FMVSS compliance, they will be approximately 5 seconds longer, or about a fifth of a percent longer than those inspections considered under

the No Action Alternative and Baseline scenario. Since the total number of inspections will not change, and any potential beneficial or adverse impacts associated with CMV inspections would be spread throughout the United States, no single area or community would be disproportionately affected (FMCSA 2001b). Furthermore, safety benefits from the implementation of the revised Safety Monitoring System would have a minor beneficial impact on socioeconomics within and beyond the border zone.

Commercial Vehicle Safety Alliance Decal—Proposed Requirement:

Under this requirement, all Mexico-domiciled CMC granted provisional operating authority under Form OP-1 (MX) would be required to maintain a current CVSA decal on all their CMV operating within the United States. In addition, CMC would be required to maintain current CVSA decals on their CMV for three years after receiving permanent OP-1 (MX) authority. FMCSA estimates that this requirement could result in 230,000 Mexican CMV inspections in 2002. The additional 50,000 inspections are necessary to meet the CVSA requirement of four yearly inspections for Mexican CMV operating pursuant to OP-1 (MX) authority. It was assumed that the average number of inspections per Mexican CMV operating pursuant to OP-2 authority should be the same than that under the Proposed and No Action scenarios. The total number of CMV inspections in the United States should be 2.83 million. These inspections would occur at existing roadside inspection stations or other existing facilities where CVSA decal inspections currently take place.

The total number of inspections should only increase by approximately 2 percent when compared to the Pro-

posed Action, No Action, and Baseline scenarios. In addition, these inspections would occur at any of the State and Federal inspection stations located throughout the United States and should not be concentrated in any particular area. Since the total number of inspections should change only marginally, and the impacts associated with CMV inspections should be spread throughout the United States, no single area or community would be disproportionately affected (FMCSA 2001b). Furthermore, safety benefits from the implementation of the CVSA requirement should have a minor beneficial impact on socioeconomics within and beyond the border zone.

4.5.3 Summary of Impacts of the Proposed Action on Socioeconomics

No Action — Moratorium Modified with Current Application Forms and Current Safety Monitoring Program

The potential socioeconomics impacts of the No Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program. The No Action Alternative could result in an increase in the number of Mexican CMV operating and being inspected in the United States relative to the Baseline Scenario. The contribution of these increases compared to nationwide operations and inspections on CMV is very minor. In addition, these minor increases in the number of Mexican CMV operating within the United States could be further reduced by the offset from the reduction in the operations associated with those United States CMV trips replaced by trips carried out by some of the Mexican CMV operating within the United States.

Furthermore, inspections on Mexican CMV would no longer be restricted to the border zone but could occur anywhere in the United States. Therefore, there would be very minor changes in operations and inspections when compared to national CMV operations and inspections.

Operation and inspection emissions of NO_x and PM would be higher than under Baseline conditions, with possible disproportionate impacts on those minority and low-income communities in the border counties. However, as previously mentioned, increases in operations are minor when compared to national CMV operations and would be offset by reductions in United States operations along the same routes. In addition, inspections could occur anywhere in the United States and would not be limited to the border zone. Thus, any impacts associated with the inspection of Mexican CMV would be spread out throughout the United States instead of being confined to the border zone. In addition, since the total number of inspections in the United States would increase only marginally, there would be very minor contributions to emissions and no effects on socioeconomics from the No Action Alternative.

Proposed Action — Moratorium Modified with Revised Application Forms and Revised Safety Monitoring Program

The potential socioeconomics impacts of the Proposed Action Alternative were determined by combining the analysis performed for the two categories of regulatory actions used in this study: applications for operating authority, and safety monitoring program (including implementation of the CVSA requirement). The resulting numbers of Mexican CMV operating and being inspected were compared to those calculated under the

Baseline Scenario and the No Action Alternative. When compared to the Baseline Scenario, the Proposed Action could result in a marginal increase in the number of Mexican CMV operating in the United States. In addition, there could be an increase in the number of inspections on Mexican CMV. When compared to the No Action Alternative, the Proposed Action could result in a marginal decrease in the number of Mexican CMV operating within the United States. In addition, there could be a significant increase in the number of inspections on Mexican CMV. Thus, although there is a slight increase in the number of Mexican CMV operating within the United States when considering the combined effect of the No Action Alternative and the implementation of the Proposed Action, this increase is a result of the No Action Alternative and not the Proposed Action itself. In fact, the Proposed Action results in a slight reduction in the number of Mexican CMV operating in the United States. However, the changes in resulting numbers of Mexican CMV are negligible when compared to national operations of CMV.

Operation and inspection emissions of NO_x and PM should be lower than those under the No Action Alternative. Furthermore, the FMCSA estimates that the implementation of the Proposed Action would improve its ability to promote the safe operation of Mexican CMV within the United States, thereby reducing the number of high-risk CMV in operation and thereby the number of safety related incidents. The effect on socioeconomics would be beneficial because the roadways will be safer. This effect would be minor however, given the proportion of Mexican to United States and Canadian CMV operating throughout the United States.

5. MITIGATION AND BEST MANAGEMENT PRACTICES

As explained in Chapter 4, because the Proposed Action by FMCSA is mostly administrative, impacts associated with this Action are expected to be minor. The only area of potential concern is the proposed focus on increasing the number of roadside inspections of Mexican CMV. This focus, however, will only marginally increase the total number of inspections in the United States. Moreover, the FMCSA anticipates that the increase in roadside inspections of Mexican CMV may cause the number of Mexico-domiciled CMC and CMV operating in the United States to be reduced (FMCSA 2001b). Therefore, the Proposed Action should not have any significant adverse effects requiring mitigation. Nonetheless, in an effort to be conservative and mitigate potential adverse impacts, areas of general and specific mitigation are discussed below.

Through the Proposed Action, the FMCSA expects to target the highest risk CMC and bring them into compliance with United States safety and environmental laws, standards, policies, rules, and regulations. The Proposed Action does not limit the operations of Mexico-domiciled CMV throughout the border zone and nation. Therefore, the only mitigation practice available is ensuring that high risk Mexico-domiciled CMC are screened out and denied operating authority in the United States through the development of the safety data-tracking database established by FMCSA based on the revised application forms and the enhanced safety monitoring program.

FMCSA has instituted proactive outreach and education efforts to minimize any potential impacts. The agency has made additional funding available to the

Border States for increased enforcement and compliance activities. FMCSA has also hired additional inspectors and used funds to purchase equipment, provide training, and conduct outreach efforts. Additionally, FMCSA trained Mexican inspectors in order to perform inspections on Mexican CMV. The DOT has developed a requirements handbook and will hold a three-day information conference to assist CMC in understanding the requirements for legal operations outside of their own countries. FMCSA itself is holding regular seminars in the border regions to educate CMC about FMCSA regulations (Lameiro 2001). These efforts could also include information regarding new requirements set forth by the Proposed Action.

More specifically, FMCSA could use Best Management Practices (BMP) to further mitigate any possible impacts. In general, BMP deployed by FMCSA to their field inspectors will limit and minimize impacts on the environment and human resources. BMP devised by agencies are used to train their staff in siting new facilities and in daily operations. The FMCSA BMP includes random roadside inspections that will not potentially have an adverse affect on the environment or human resources.

Inspectors should take great care in initiating and conducting random roadside inspections on Mexico-based CMV. Specifically, the FMCSA could implement inspector education and training on BMP policies for conducting safe inspections. For example, FMCSA could instruct its roadside inspectors not to perform random inspections in or near any of the following sensitive receptor areas: railway crossings, highway ramps and interchanges; human structures (especially schools, hospitals, and residences); wetlands, floodplains

during a storm; wilderness areas, ecological/wildlife refuges, preserves, conservation areas and sanctuaries; threatened and endangered species and their habitat; coastal zones; steeply sloping terrain; hazardous waste sites; capped land fills; wild and scenic rivers; scenic highways, national natural landmarks, prime and unique farmlands; historical, archeological and cultural sites; and national and state parks and recreation areas.

Furthermore, the inspectors should not conduct a random roadside inspection under dangerous conditions, including severe weather warnings. The random roadside inspections could be planned to the maximum extent possible so as to not impact one highway corridor during the day or during peak commuting hours (7:00 to 10:00 a.m. and 4:00 to 7:00 p.m.) near metropolitan centers, thus reducing the potential of congestion. Additionally, FMCSA random roadside inspections could have a buffer zone between planned inspections along a given highway corridor. To the extent practicable, a majority of the random roadside inspections on Mexico-based CMV could take place outside of the commercial border zone so as to minimize adverse impacts on the existing infrastructure, congestion, and emissions in the border region. Any indication of leaking fluids from the fuel tank, engine, or cargo department of the Mexico-domiciled CMV should result in the inspector immediately contacting local police and fire departments, and where necessary, the state Hazardous Materials Rapid Response Team.

The actual types and extent of minor impacts indirectly related to the Proposed Action would depend upon site-specific conditions. These actions could include new state inspection stations that would be subject to its own site-specific NEPA analysis prepared by the state.

In the FMCSA Proposed Action, no new construction of any facility or roadway is planned. The adherence of the FMCSA inspectors to BMPs for inspections at existing stations, random inspections, the siting of new inspection stations, and any other BMPs developed in the future will mitigate and assuage any deleterious environmental and human resources impacts from the planned roadside inspections for Mexico-based CMV, and thus the Proposed Actions.

The Proposed Action by FMCSA has no significant environmental impacts and thus requires no mitigation. If in the future it is determined that adverse impacts are occurring, FMCSA may consider developing strategies to address those impacts.

6. LIST OF PREPARERS AND REVIEWERS

The following is a list of contributors to this Programmatic Environmental Assessment.

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APPENDIX A — DEFINITION OF COMMERCIAL MOTOR VEHICLES AND DESCRIPTION OF ROADSIDE INSPECTIONS

Commercial motor vehicle (CMV) are defined as self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle—

(1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,537 kg (10,001 lb) or more; whichever is greater; or

(2) Is designed or used to transport more than 8 passengers (including the driver) for compensation; or

(3) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(4) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C. (49 CFR 390.5)

Roadside inspections of CMC are carried out by FMCSA to ensure the safety of operation of drivers and commercial vehicles in the United States. There are six different levels of inspections:

- Level I- North American Standard Inspection
- Level II- Walk-Around Driver/Vehicle Inspection
- Level III- Driver-Only Inspection
- Level IV- Special Inspections

- Level V- Vehicle-Only Inspection
- Level VI- Enhance NAS Inspection for Radioactive Shipments

The North American Truck Inspection Procedure (Level I) consists of first interviewing the driver and collecting all of his/her documents and paperwork. Then, the inspector checks for the presence of hazardous materials. After checking thoroughly for hazardous materials, the inspector reviews all of the documents and the paperwork received from the CMC. Next, the inspector starts the vehicle inspection, starting with the left front of the truck and examining all parts, including the trailer and wheels, and moving then to the left rear of the truck. The right rear comes next, followed by the right saddle tank area and the right fuel tanks. The inspector then moves up to the right front of the truck and continues by checking the steering wheel lash, the air loss rate, the axles, and the brake adjustment. The inspection is completed by inspecting the tractor protection system that includes both the tractor protection valve and the emergency brakes, and the fifth wheel movement (CVSA 2001). The engine will be off for most of the inspection. There are, however, some parts of the inspection, such as verification of the air pressure, where the truck must be running to build up the air (Cisneros 2001). The Level I inspection is the most intensive and takes about 20 minutes. These inspections are held primarily at the border inspection stations in Arizona, California, New Mexico and Texas. The other inspection levels take less time to complete, and are done less frequently than the Level I inspections (Cisneros 2001).

The Level II inspection includes only the items from the Level I inspection that can be inspected without

physically getting under the vehicle. The Level III inspection includes an examination of the driver and his/her documents and paperwork. The Level IV inspection includes a one-time inspection of a particular item. The Level V inspection includes all parts of a vehicle in a Level I, without a driver being present. These inspections can be conducted at any location. The Level VI inspections consist of an inspection for select radiological shipments, which include inspection procedures, enhancements to the Level I inspection, radiological requirements, and the enhanced out-of-service criteria. Select radiological shipments include only highway route controlled quantities as defined by title 49, Section 173.403 and all transuranics (CVSA 2001). Buses are subject to the same requirements but escape doors and windows are also inspected.

If a truck fails the inspection, it is placed out-of-service. The ensuing action varies by State and is determined by the inspection station polices, as well as by practical conditions at the time the vehicle is rendered under out-of-service status. For example, in most cases in California the out-of-service truck would remain parked at the inspection site until the repairs are made. In the rare case that the repairs cannot be made on site, the company can have the vehicle towed to a repair facility. In Arizona, if the vehicle can be fixed within 2 hours, it is allowed to remain onsite until the repairs are made. If the repairs will take longer than 2 hours, either the company or United States Customs will tow the vehicle to a repair facility. At various border locations in Texas, the policies change based on the available space at that specific site. In some cases, the vehicle may be allowed to return to Mexico for repairs; on other occasions, the repairs are made on site (Cisneros 2001).

Aside from direct and indirect safety benefits, the inspections could have an environmental benefit, as they have the potential to alert officials of other problems, such as leaking CMV. There is always the possibility that leaking CMV could cause environmental harm, but if officials become aware of the problem they could notify the proper environmental authorities to address the issue and minimize any potential environmental effect from the release of hazardous and other materials from the CMV.

APPENDIX B — ROLES OF SELECTED AGENCIES WITH ENVIRONMENTAL AND PUBLIC HEALTH OVERSIGHT AUTHORITY OVER THE OPERATION OF CMC IN THE UNITED STATES

Below is a summary of the regulatory functions that Federal agencies other than FMCSA play in the oversight of the operation of CMC in the United States.

The Environmental Protection Agency (EPA) regulates air emissions from braking action and fuel. Within the EPA, the Office of International Affairs, Region 6, and Region 9 have personnel who, on a regular basis, work with State and local government officials to monitor air quality in the cities along the southern borders of Texas and New Mexico. In areas where air quality does not meet federal standards, appropriate local and State agencies work with EPA to design air quality improvement plans to reduce emissions, to improve air quality to national standards. The EPA also sponsors a program, known as The Border XXI Program, which protects and improves the environment and environmental health while fostering sustainable development in the United States-Mexico border region, is an alliance of organizations dedicated to environmental progress on the United States-Mexico Border area.

* * * * *

APPENDIX C — AIR QUALITY

This section presents detailed information on modeling methodology, criteria pollutants, air quality health effects, legislation, current state of the environment, and source characteristics. This section serves as a complement to the general air quality information provided in the Air Quality Section in Chapter 3 (Section 3.4).

To quantify the magnitude of direct pollutant emissions resulting from the inspections of Mexican CMC, the EPA emissions models, MOBILE5a and PART5, were used. MOBILE5a was used to determine emission factors for CO, VOC, and NO_x. PART5 was used to determine emission factors for Pb, SO_2, PM_{10}, and $PM_{2.5}$. Due to the lack of actual modeling data and the resulting assumptions that needed to be made, the predictions from these models should only be considered provisional, first-order approximations. The following list indicates the data and assumptions that were used in modeling the emissions during the inspections (FMCSA 2001b):

Total inspection time of 50 minutes.

- Engine on time (idle) of 15 minutes during inspection.
- Approximately 130,000 out of 400,000 Mexican heavy-duty vehicles were considered to be manufactured after 1994. Modeling was conducted for years 1986 and 1994.
- 2.3 million inspections occur on heavy-duty trucks and buses in the United States each. The amount of total inspections performed will not change but under the proposed actions a shift will occur to inspect more Mexican heavy-duty trucks and buses.

Under the No-Action Alternative the number inspections of Mexican trucks and buses will be 170,000 in 2002. Under Rule 3: Safety Fitness Oversight Program for New Applicants 180,000 inspections of Mexican trucks and buses would occur in 2002. Under the Commercial Vehicle Safety Alliance requirement, 230,000 inspections would occur on Mexican CMV in 2002.

- The average VMT for CMV was assumed to be 80,000 per year (VIUS 1999).
- The daily maximum and minimum temperatures (i.e., part of the local area parameters for MOBILE5a) were estimated for the border areas (i.e., San Diego, CA and El Paso, TX) to be 51 and 76 degrees Fahrenheit.
- The modeling temperatures (i.e., part of the scenario data for MOBILE5a) were also estimated for the border areas as 51 and 76 degrees Fahrenheit. Both of these temperatures were used to create different scenario runs.
- The Reid Vapor Pressure of 14.9 psi was obtained from published literature for gasoline samples with a "high volatility" rating (Bardon and Rao 1984).
- The weights of heavy-duty vehicles were modeled by using both the low end at 8,500 lbs and the high end at 80,000 lbs (limit for a United States truck). Although Mexican vehicles can weigh more than 80,000 lbs, it was not considered likely that there would be many above this value.
- Only heavy-duty gasoline and diesel vehicles and buses were modeled. The default fleet mix for vehicle-miles-traveled as provided by the models was used. Since MOBILE5a does not explicitly provide emission factors for buses, they were assumed to be similar to those for heavy-duty diesel vehicles.

The data and assumptions in this list are generally very conservative. For those cases when more than one scenario was modeled (e.g., for different temperatures), the higher emission factors were used. A significant confounding variable in this analysis is that both MOBILE5a and PART5 were based on United States vehicles. Therefore, the methods and/or data that form the backbone of these models may not be applicable to Mexican vehicles. However, it is believed that the conservative nature of this analysis overrides the magnitude of this affect. The analysis also took into account evaporative hydrocarbon losses for heavy-duty gasoline vehicles. Diesel fuel does not evaporate. For simplicity and conservatism, the total VOC emissions were used for the idling condition. The evaporative emissions (i.e., diurnal, hot soak, and resting) during the engine-off period were also taken into account by using the appropriate evaporative components provided by MOBILE5a.

Table C-1 shows the primary and secondary standards used to regulate air pollution in the United States. The standards for short term averages (i.e., less than 24 hours) are devised to protect the public from short-term exposures resulting in adverse health effects, and the standards for long term averages (i.e., annual) are devised to protect the public from both short-term and prolonged exposures.

Table C-1. NAAQS as of December 2000

	Primary Standard		Secondary Standard	
Pollutant	**Type of Average**	**Standard Level Concentration**	**Type of Average**	**Standard Level Concentration**
CO	8-hour	9 ppm	No Secondary Standard	
	1-hour	35 ppm	No Secondary Standard	
Pb	Maximum Quarterly Average	1.5 ug/m^3	Same as Primary Standard	
NO_2	Annual Arithmetic Mean	0.053 ppm	Same as Primary Standard	
O_3	Maximum Daily 1-hour Average	0.12 ppm	Same as Primary Standard	
	4th Maximum Daily 8-hour Average	0.08 ppm	Same as Primary Standard	
PM_{10}	Annual Arithmetic Mean	50 ug/m^3	Same as Primary Standard	
	24-hour	150 ug/m^3	Same as Primary Standard	
$PM_{2.5}$	Annual Arithmetic Mean	15 ug/m^3	Same as Primary Standard	
	24-hour	65 ug/m^3	Same as Primary Standard	
SO_2	Annual Arithmetic Mean	0.03 ppm	3-hour	0.50 ppm
	24-hour	0.14 ppm		

Source: EPA 2001.

Sources for the criteria pollutants and their status are presented in the following discussions:

Carbon Monoxide

Carbon monoxide (CO) is a colorless, odorless gas that is caused by incomplete carbon combustions. Vehicle exhaust accounts for about 60 percent of all CO emissions in the United States. Therefore, the highest concentrations of CO are found in areas of heavy traffic congestion; in urban areas vehicle exhaust accounts for 95 percent of CO emissions. Other causes of CO are industrial sources, non-transportation fuel combustion, and wildfires (EPA 2001). A majority of the non-attainment areas are in the western half of the United States with California having the highest CO levels. Also having non-attainment levels were parts of counties in Washington, Idaho, Oregon, Montana, Utah, Colorado, Nevada, Arizona, and Texas in the west and Pennsylvania and Massachusetts in the East (EPA 2001).

Lead

Prior to the enactment of EPA regulations that reduced the content of lead in gasoline during the late seventies and early eighties, the primary source of lead (Pb) emissions in the United States was the automobile. Now, the major sources of lead emissions are industrial processes, primarily metals processing. The highest concentrations of lead in the air are near smelters and battery processors. Lead emissions and concentrations decreased sharply during the 1980s and early 1990s. The emissions decreased 95 percent in 20 years and the concentrations decreased by 94 percent in the same period (EPA 2001). Parts of counties in Montana, Nebraska, Missouri, and Tennessee have non-attainment levels of lead in the atmosphere (EPA 2001).

Nitrogen Dioxide

High temperature combustion processes are the major sources of nitrogen dioxide (NO_2) nationwide. These processes are found in both automobiles and power plants. Indoor heaters and gas stoves also can create harmful indoor quantities of the gas. Out of the areas that at one time violated the national air quality standard for NO_2, all areas now meet the standard (EPA 2001). There are no officially designated non-attainment areas for NO_2 (EPA 2001).

Ozone

Ozone (O_3) is a gas that is formed from a reaction between VOCs and NO_x in the presence of heat and sunlight. Some examples of VOC emission sources are, motor vehicles, chemical plants, refineries, factories, consumer and commercial products and other industrial sources. The NO_x sources are listed above. Ideal conditions for ozone formation are high temperatures, clear skies, light winds and limited vertical mixing. The ozone levels at urban and suburban locations have decreased almost 25 percent over the past 20 years while the rural locations have only decreased by 14 percent (EPA 2001). There are many non-attainment designations in the United States with almost the entire states of Massachusetts, New Jersey, Connecticut and Rhode Island covered by this status. Also in a non-attainment designation are most of Pennsylvania, California, Maryland, and Delaware; and also select counties in New York, Arizona, New Mexico, Texas, Colorado, Oregon, Louisiana, Missouri, Illinois, Virginia, Kentucky, Indiana, Wisconsin, Georgia, and Alabama (EPA 2001).

Sulfur Dioxide

Sulfur dioxide ($S0_2$) is formed when fuels containing sulfur (mostly coal and oil) are burned and also during metal smelting and other industrial processes. Fuel combustion accounts for a majority of the SO_2 emissions thereby causing most of the nation's SO_2 to be found in the vicinity of large industrial facilities such as coal-fired power plants. SO_2 concentrations have decreased almost 50 percent from 1980 to 1999 and emissions have decreased 28 percent. These decreases are due mostly to SO_2 controls that EPA implemented as part of their Acid Rain Program in 1995 (EPA 2001). The non-attainment designations are in Montana, Nevada, Utah, Arizona, New Mexico, Minnesota, Wisconsin, Indiana, Ohio, West Virginia, Pennsylvania, and New Jersey (EPA 2001).

Particulate Matter

Particulate matter (PM_{10}) are particles that are less than 10 micrometers in diameter and are a mixture of solid particles and liquid droplets found in the air such as dust, dirt, soot and smoke. These particles are generated from a number of different sources: combustion from motor vehicles, power generation, industrial facilities, fires, driving on unpaved roads and wind blowing on dust are just a few. From 1990 to 1999, the concentration of these particles decreased by 18 percent and the emissions decreased by 16 percent. In 1999, EPA started monitoring $PM_{2.5}$ particles that are less than 2.5 micrometers in diameter. In addition to the monitoring of the $PM_{2.5}$ particles, in 2000 EPA started a Phase II Acid Rain Program to regulate coal-fired power plants. The non-attainment designations for PM_{10} were mostly in the west (EPA 2001). There were parts of counties in Connecticut, Pennsylvania,

Indiana, Illinois, Texas, New Mexico, Colorado, Nevada, Utah, Wyoming, Montana, Idaho, Washington, and Oregon with the largest numbers of counties in California and Arizona (EPA 2001).

The formation of these criteria pollutants and their health effects are presented in Table C-2. The health effects can be categorized into two general categories: acute and chronic. Acute or short-term effects usually include irritations, headaches, and nausea. Chronic or long-term effects may include decreased lung capacity and cancer.

Table C-2. Criteria Pollutant Description and Potential Health Effects

Pollutant	Pollutant Description	Potential Health Effects
CO	Colorless, odorless gas that is caused by incomplete carbon combustion.	CO acts as an asphyxiant by interfering with the blood's ability to carry oxygen from the lungs to the rest of the body. It can impair the brain's ability to function properly and is a threat especially to individuals with cardiovascular disease.
Pb	Solid emitted usually as an inorganic particle from any processors that use lead such as smelters, battery manufactures, etc.	Inhalation and/or congestion can result in behavioral changes, learning disabilities, seizures, severe and permanent brain damage, and death.
NO_2	Reddish-brown, highly reactive gas formed from high temperature combustion through reactions involving N_2 and oxygen.	NO_2 can irritate lungs, cause bronchitis and pneumonia, and impair an individual's resistance to infections.
O_3	Gas that is formed from a reaction between VOCs and NO_X in the presence of heat and sunlight.	Exposure to O_3 can cause chest constrictions and irritations of the mucous membranes.
PM	Particulate matter either solid or liquid usually in the range of 0.005 to 100 micrometers in aerodynamic diameter. Other related terms include aerosols, dust, fumes, soot, etc.	In general, the smaller the PM, the deeper it can penetrate into the respiratory system, and the more damage it can cause. Depending on size and composition, PM can damage lung tissue, aggravate existing respiratory and cardiovascular diseases, and cause cancer.
SO_2	Gas formed when fuels containing sulfur are burned (combusted).	As a gas, it is highly soluble in water and will likely be trapped in the upper respiratory tract causing irritations but less long-term damage. When entrained in an aerosol, SO_2 can reach far deeper into the respiratory system causing severe respiratory distress.

Source: Masters 1998 and EPA 2001.

Table C-3 presents the contribution of different sectors of the United States economy to total emissions of criteria pollutants. Transportation emissions include all ground, air, and water transportation systems.

Table C-3. Source Contribution to Emissions for the United States during 1999

Pollutant	Percent Source Contribution			
	Transportation[a]	Industrial Processes	Fuel Combustion	Miscel-laneous
CO	77.1	7.8	5.5	9.6
Pb	12.8	75.3	11.9	0.0
NO_2	55.5	3.7	39.5	1.3
VOC	47.0	44.1	5.0	3.9
PM_{10}	24.7	41.5	33.8	0.0
$PM_{2.5}$	27.6	39.4	33.0	0.0
SO_2	6.9	7.8	85.3	0.1

[a]Including on-road and off-road sources.
Source: EPA 2001.

Table C-4 presents a summary of the contribution of the different types of on-road vehicles to total vehicle emissions in the United States. Vehicles are classified according to size and fuel type.

Table C-4. Total Emissions from On-Road Mobile Sources in 1999

Pollutant	Total Emissions by Vehicle Category (thousand short tons)					
	LDGV[a]	LDGT[b]	HDGV[c]	Diesels[d]	Total On-Road Vehicles[e]	Total from all Sources[f]
CO	27,382	16,115	4,262	2,230	49,989	88,063
Pb	14	7	1	0	22	4,199
NO_2	2,859	1,638	459	3,635	8,590	25,393
VOC	2,911	1,722	375	289	5,297	18,145
PM_{10}	59	36	12	189	295	23,679
$PM_{2.5}$	34	22	8	166	229	6,773[g]
SO_2	137	91	17	118	363	18,867

[a]LDGV = Light Duty Gas Vehicle (Includes motorcycles).
[b]LDGT = Light Duty Gas Truck.
[c]HDGV = Heavy Duty Gas Vehicle.
[d]Diesels = Encompasses all diesel vehicles.
[e]Values may not equal total due to rounding.
[f]Includes all sources (i.e., transportation, industrial processes, fuel combustion, and miscellaneous).
[g]From 1998.
Source: EPA 2001.

Table C-5 shows the changes in emissions and concentrations of criteria pollutants in the United States for the last 20 years.

Table C-5. Percent Changes in Emissions and Concentrations in the US (1980-1999)

Pollutant	Percent Change in Emissions	Percent Change in Atmospheric Concentrations
CO	-21	-57
Pb	-94	-94
NO_2	+4	-25
VOC/O_3	-31[a]	-12[b]
PM_{10}	-15[c]	-18[c]
$PM_{2.5}$	N/A[d]	-17[c]
SO_2	-27	-50

[a]Emissions of VOCs.
[b]Concentration of O_3 for 8-hr.
[c]For 1990-1999.
[d]Not Available.
Source: EPA 2001.

Table C-6 shows estimated pollutant emissions due to these different fuel types. The emission estimates were calculated using EPA's MOBILE5 and PART5 models.

Table C-6. Estimated Total 1997 Vehicle Emissions by Fuel Type

Pollutant	Emissions due to Gasoline (x 1000 Tons)	Emissions due to Diesel (x 1000 Tons)
CO	48,749	1,509
NO_X	5,103	1,933
VOC	4,989	238
SO_2	235	84
PM_{10}	105	165
$PM_{2.5}$	63	144

Source: EPA 2001.

Emissions from Operation and Inspection of Mexican CMV

Table C-7 shows the total amount of emissions—for criteria pollutants—generated by the approximately 7 1,500 Mexican CMV projected to operate in FY2002 under Baseline conditions.

Table C-7. Total Annual Emissions from Operations of Mexican CMV under the Baseline Scenario

Pollutant	Operations[a] (short tons)	Total from On-Road Vehicles[b] (short tons)	% of On-Road[c]	Total all Sources[d] (short tons)	% of all Sources[e]
CO	307826	49989000	0.6158%	88063000	0.3496%
NO_2	116489	8590000	1.3561%	25393000	0.4587%
VOC	45182	5297000	0.8530%	18145000	0.2490%
Pb	60	22000	0.2734%	4199000	0.0014%
SO_2	7835	363000	2.1585%	18867000	0.0415%
PM_{10}	9397	295000	3.1855%	23679000	0.0397%
$PM_{2.5}$	8528	229000	3.7239%	6773000	0.1259%

[a]= Total emissions from the operation of Mexican CMVs in the Border Zone
[b]= Total emissions from the operation of on-road vehicles in the United States
[c]= % of On-Road = (Inspections/Total from On Road Vehicles) X 100%
[d]= Total emissions from all sources in the United States
[e]= % of all Sources = (Inspections/Total from all Sources) X 100%

Table C-8 shows the total amount of emissions—for criteria pollutants—generated by the approximately 73,000 Mexican CMV projected to operate in FY2002 under the No Action Alternative.

Table C-8. Total Annual Emissions from Operations of Mexican CMV under the No Action Alternative

Pollutant	Operations[a] (short tons)	Total from On-Road Vehicles[b] (short tons)	% of On-Road[c]	Total all Sources[d] (short tons)	% of all Sources[e]
CO	314284	49989000	0.6287%	88063000	0.3569%
NO_2	118933	8590000	1.3846%	25393000	0.4684%
VOC	46130	5297000	0.8709%	18145000	0.2542%
Pb	61	22000	0.2791%	4199000	0.0015%
SO_2	8000	363000	2.2038%	18867000	0.0424%
PM_{10}	9594	295000	3.2523%	23679000	0.0405%
$PM_{2.5}$	8707	229000	3.8021%	6773000	0.1286%

[a]= Total emissions from the operation of Mexican CMVs in the Border Zone
[b]= Total emissions from the operation of on-road vehicles in the United States
[c]= % of On-Road = (Inspections/Total from On Road Vehicles) X 100%
[d]= Total emissions from all sources in the United States
e = % of all Sources = (Inspections/Total from all Sources) X 100%

Table C-9 shows the total amount of emissions—for criteria pollutants—generated by the approximately 72,000 Mexican CMV projected to operate in FY2002 under the Proposed Action Alternative.

Table C-9. Total Annual Emissions from Operations of Mexican CMV under the Proposed Action Alternative

Pollutant	Operations[a] (short tons)	Total from On-Road Vehicles[b] (short tons)	% of On-Road[c]	Total all Sources[d] (short tons)	% of all Sources[e]
CO	309978	4998900	0.6201%	8806300	0.3520%
NO_2	117304	8590000	1.3656%	25393000	0.4620%
VOC	45498	5297000	0.8589%	18145000	0.2507%
Pb	61	22000	0.2753%	4199000	0.0014%
SO_2	7890	363000	2.1736%	18867000	0.0418%
PM_{10}	9463	295000	3.2077%	23679000	0.0400%
$PM_{2.5}$	8587	229000	3.7500%	6773000	0.1286%

a= Total emissions from the operation of Mexican CMVs in the Border Zone
b= Total emissions from the operation of on-road vehicles in the United States
c= % of On-Road = (Inspections/Total from On Road Vehicles) X 100%
d= Total emissions from all sources in the United States
e= % of all Sources = (Inspections/Total from all Sources) X 100%

Table C-10 shows the total amount of emissions—for criteria pollutants—generated from the inspection of 170,000 Mexican CMV under the Baseline Scenario.

Table C-10. Total Annual Emissions from Inspections of Mexican CMV under the Baseline Scenario

Pollutant	Inspections[a] (short tons)	Total from On-Road Vehicles[b] (short tons)	% of On-Road[c]	Total all Sources[d] (short tons)	% of all Sources[e]
CO	35.5797	49,989,9000	0.00007118%	88,0630,000	0.00004040%
NO_2	2.7370	8,590,000	0.00003186%	25,393,000	0.00001078%
VOC	7.7720	5,297,000	0.00014672%	18,145,000	0.00004283%
Pb	0.0013	22,000	0.00000580%	4,199,000	0.00000003%
SO_2	0.1330	363,000	0.00003665%	18,867,000	0.00000071%
PM_{10}	0.1747	295,000	0.00005921%	23,679,000	0.00000074%
$PM_{2.5}$	0.1585	229,000	0.00006922%	6,773,000	0.00000234%

a= Total emissions from the inspections of Mexican CMVs
b= Total emissions from the operation of on-road vehicles in the United States
c= % of On-Road = (Inspections/Total from On Road Vehicles) X 100%
d= Total emissions from all sources in the United States
e= % of all Sources = (Inspections/Total from all Sources) X 100%

Table C-11 shows the total amount of emissions—for criteria pollutants—generated from the inspection of 180,000 Mexican CMV under the No Action and Proposed Action Altemative.

Table C-11. Total Annual Emissions from Inspections of Mexican CMV under the No Action Alternative

Pollutant	Inspections[a] (short tons)	Total from On-Road Vehicles[b] (short tons)	% of On-Road[c]	Total all Sources[d] (short tons)	% of all Sources[e]
CO	37.6727	49,989,000	0.00007536%	88,063,000	0.00004278%
NO_2	2.8980	8,590,000	0.00003374%	25,393,000	0.00001141%
VOC	8.2292	5,297,000	0.00015535%	18,145,000	0.00004535%
Pb	0.0014	22,000	0.00000614%	4,199,000	0.00000003%
SO_2	0.1409	363,000	0.00003880%	18,867,000	0.00000075%
PM_{10}	0.1850	295,000	0.00006269%	23,679,000	0.00000078%
$PM_{2.5}$	0.1679	229,000	0.00007330%	6,773,000	0.00000248%

a= Total emissions from the inspections of Mexican CMVs
b= Total emissions from the operation of on-road vehicles in the United States
c= % of On-Road = (Inspections/Total from On Road Vehicles) X 100%
d= Total emissions from all sources in the United States
e= % of all Sources = (Inspections/Total from all Sources) X 100%

Table C-12 shows the total amount of emissions—for criteria pollutants—generated from the inspection of 230,000 Mexican CMV under the CVSA Supplemental Alternative.

Table C-12. Total Annual Emissions from Inspections of Mexican CMV under the Proposed Action Alternative

Pollutant	Inspections[a] (short tons)	Total from On-Road Vehicles[b] (short tons)	% of On-Road[c]	Total all Sources[d] (short tons)	% of all Sources[e]
CO	48.2175	49,989,000	0.00009646%	88,063,000	0.00005475%
NO_x	3.7092	8,590,000	0.00004318%	25,393,000	0.00001461%
VOC	10.5326	5,297,000	0.00019884%	18,145,000	0.00005805%
Pb	0.0017	22,000	0.00000785%	4,199,000	0.00000004%
SO_x	0.1803	363,000	0.00004966%	18,867,000	0.00000096%
PM_{10}	0.2367	295,000	0.00008024%	23,679,000	0.00000100%
$PM_{2.5}$	0.2148	229,000	0.00009381%	6,773,000	0.00000317%

a= Total emissions from the inspections of Mexican CMVs
b= Total emissions from the operation of on-road vehicles in the United States
c= % of On-Road = (Inspections/Total from On Road Vehicles) X 100%
d= Total emissions from all sources in the United States
e= % of all Sources = (Inspections/Total from all Sources) X 100%

APPENDIX D — ENVIRONMENTAL SCREENING PROCESS

Introduction

The following resources were eliminated from the environmental consequences analysis because of the insignificance of the impacts on these resources from the implementation of the four proposed rules and supplemental alternatives: topography, biological resources, cultural resources, visual resources, endangered species, water resources, land use, hazardous waste and solid waste. These resources were dropped from detailed environmental analysis because: 1) the alternatives do not require any construction activities, and 2) the resource consumption levels and associated waste generation required for longer application forms are insignificant. This appendix includes the calculations of the impacts on resource consumption, which aided in the determination of the insignificant impacts on the above-mentioned resources and the specifics behind why these resources were eliminated.

* * * * *

APPENDIX E — NOISE EMISSIONS ANALYSIS

* * * * *

APPENDIX F — SELECTED NAFTA ENVIRONMENTAL REFERENCES

CEC, 2001. *"Closing the Pathways of Aquatic Invasive Species Across North America."* Commission for Environmental Cooperation, Conservation of Biodiversity. April 11, 2001.

http://www.cec.org/programs_projects/conserv_biodiv/217/index.cfm?varlan=english

This document presents the work of a project designed to develop alternatives to protect marine and aquatic ecosystems from the effects of aquatic invasive species. The initiative will develop a coordinated, multinational prevention and control campaign aimed at eliminating pathways for the introduction of invasive species among the coastal and fresh waters of Canada, Mexico, and the United States.

CEC, 2001. *"Assessing Environment and Trade Relationships."* Commission for Environmental Cooperation, Environment, Economy and Trade. April 11, 2001.

http://www.cec.org/programs_projects/trade_environ_econ/112/index.cfm?varlan=english

This project is designed to deepen understanding of the linkages between the environment and trade liberalization, in accordance with the provision in Article 10(6)(d) of NACEC to undertake an "ongoing assessment" of the environmental effects of NAFTA. Among the strengths of NACEC's work in this area is the commitment to undertake trade-related environmental assessments in an open and participatory way.

CEC, 2001. *"Tri-national Air Quality Improvement Initiative: North American Trade and Transportation Corridors."* Commission for Environmental Cooperation, Pollutants and Health. April 11, 2001.

http://www.cec.org/programs_projects/pollutants_health/313/index.cfm?varlan=english

This project seeks to address significant air quality and other environmental issues associated with transport along North American trade corridors. Such issues affect all three countries of North America.

CEC, 2001. *"Comparative Report on Environmental Standards."* Commission for Environmental Cooperation, Law and Policy. April 11, 2001.

http://www.cec.org/programs_projects/law_policy/411/index.cfm?varlan=english

NACEC is preparing a report on existing environmental standards in an area of concern for Canada, Mexico and the U. S. Areas under current consideration include, for example, trends in trade in wastes and the regulatory regimes controlling transboundary movement of wastes, intensive agriculture practices, control regimes for invasive species, and controls on air emissions from electricity generating facilities. This report will form the basis for identifying a process to develop greater compatibility of environmental technical regulations and standards in the area studied.

CEC, 1999. *"Assessing Environmental Effects of the North American Free trade Agreement: An Analytic Framework (Phase II) and Issue Studies (3)."* Communications and Public Outreach Department of the CEC Secretariat, Commission for Environmental Cooperation. March 1999.

http://www.cec.org/pubs_info_resources/publications/pdfs/english/engframe.pdf

This document is the second draft of a methodology for examining the environmental effects of NAFTA. This methodology represents the ongoing work of a team of more than two-dozen experts, with advice from dozens of other experts and stakeholders from the United States, Canada, and Mexico. In addition to the methodology, this report contains three issue studies taken from the agriculture and energy sectors that were chosen to test and enrich the framework.

CEC, 1997. *"NAFTA's Institutions: The Environmental Potential and Performance of the NAFTA Free trade Commission and Related Bodies."* Communications and Public Outreach Department of the CEC Secretariat, Commission for Environmental Cooperation. November 1997.

http://www.cec.org/pubs_info_resources/publications/pdfs/english/NAFTen.pdf

This project presents a framework to be used for the ongoing monitoring of the environmental changes occurring throughout North America in the wake of NAFTA and the side agreements negotiated in conjunction with it. This study analyzes the way NAFTA's economic institutions have moved to fulfill their responsibilities and potential for environmental enhancement specific in the NAFTA text, and have acted synergistically with NAFTA's environmental institutions. Specifically, the document identifies and assesses NAFTA's achievements during the first three years and evaluates how they might be built upon in the future.

CEC, 1996. *"NAFTA Effects—Potential NAFTA Effects: Claims and Arguments 1991-1994."* Commission for Environmental Cooperation. August 1996.

http://www.cec.org/pubs_info_resources/publications/enviro_trade_econ/claindex.cfm?varlan= english

This document identifies the major claims and arguments made by governments, academics, nongovernmental organizations (NGOs), and others in Canada, the United States, and Mexico, suggesting that there are potential direct and indirect environmental effects of the NAFTA.

CEC, 1996. *"NAFTA Effects–A Survey of Recent Attempts to Model the Environmental Effects of Trade."* Commission for Environmental Cooperation. August 1996.

http://www.cec.org/pubs_info_resources/publications/pdfs/english/nsae.pdf

This document reviews current theoretical understandings about the impact of trade, trade liberalization, and trade agreements on the environment. It also discusses the state of knowledge about modeling and analyzing the environmental effects of trade.

CEC, 1996. *"Dispute Avoidance: Weighing the Values of Trade and the Environment under the NAFTA and the NAAEC."* Commission for Environmental Cooperation. October 1996.

http://www.cec.org/pubs_info_resources/publications/pdfs/english/disputee.pdf

This document examines past, present, and potential environmental trade disputes in North America, in order to identify ways to avoid and/or resolve such disputes. The report also discusses trade policies and dispute resolution systems already in place

under NAFTA and GATT, and cites possible improvements.

CEC, 1996. *"Building a Framework for Assessing NAFTA Environmental Effects Report of a Workshop held in La Jolla, CA, on April 29 and 30, 1996."* Commission for Environmental Cooperation. November 1996.

http://www.cec.org/pubs_info_resources/publications/pdfs/english/builde.pdf

This document makes available the presentations and supporting documents from the CEC's first public meeting of its NAFTA Effects Project. In addition to presenting original research from top experts in Mexico, the United States, and Canada, this report includes both a summary of the workshop, and contact information.

CPA, 2001. Rylander , Carole Keeton. "Economic Factors Affecting Cross-border Transportation." *State Functions at the Texas-Mexico Border and Cross-Border Transportation.* Texas Comptroller of Public Accounts. January 2001.

http://www.cpa.state.tx.us/specialrpt/border/sfatb1.html

This document contains the border logistics at the United States–Mexico border in Texas. It explains the *maquilladoras* role in the population and traffic increase at the border and also discusses other general border information.

CPA, 2001. Rylander , Carole Keeton. "The Cross-Border Process." *State Functions at the Texas-Mexico Border and Cross-Border Transportation.* Texas Comptroller of Public Accounts. January 2001.

http://www.cpa.state.tx.us/specialrpt/border/sfatb4.html
This document discusses the border crossing process between the United States and Mexico at the Texas border. It includes the pre-border crossing activities in Mexico, bridge crossing processes and both Mexican and United States Inspections processes.

EPA, 2000. *Protecting the Environment of the United States–Mexico Border Area.* United States Environmental Protection Agency Border Program. Washington: December 2000.

http://www.scerp.org/transition.pdf
This paper discusses the many tools that the United States and Mexico have developed to carry out improvement at the United States–Mexico border, an area under particularly strong environmental stress. It also discusses the opportunities for the new United States and Mexican Administrations and the opportunities that they have to advance institutional and environmental improvements.

GTW, 2001. Hunter, J. Martin, et al. "In the Matter of Cross-Border Trucking Issues." *NAFTA Panel Established Pursuant to Chapter Twenty.* Public Citizen Global Trade Watch. February 2001.

http://www.citizen.org/pctrade/nafta/naftapg.html
This discussion states that the panel must decide whether the United States is in breach of Articles 1202 and/or 1203 of NAFTA by failing to modify its

moratorium on the processing of applications by Mexican-owned trucking firms for authority to operate in the United States border states.

USITC, 2000 "International Trade Developments." *International Economic Review.* United States. Office of Economics. Washington: August/September 2000.

http://www.usitc.gov/ier.htm
This document measures the impact of free trade on the environment. The document finds evidence that freer trade may induce cleaner production in poorer countries while resulting in small increases in pollution. This minor effect may also be offset by improved environmental regulations, as freer trade causes income to rise.

USMCC, 1998 "*Environmental Issues in Mexico under NAFTA.*" United States—Mexico Chamber of Commerce, NAFTA Forum Series. Washington. May 1998.

http://www.usmcoc.org/environment.html
This paper describes NAFTA's impact on the environmental situation in Mexico. It also highlights binational and multinational Mexican institutions that are working to improve Mexico's environment. This paper also explains the opportunity that United States environmental technology firms have to export solutions to Mexico.

APPENDIX G — SOCIOECONOMIC DEMOGRAPHIC NUMBERS

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APPENDIX H — PROPOSED FORMS OP-2 AND OP-1 (MX)

* * * * *

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FILED
FEB 3 - 2004
OFFICE OF THE CLERK

No. 03-358

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX
VOLUME II

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October 1, 2001

Honorable Julie Anna Cirillo, Deputy Administrator
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c/o Docket Clerk
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RE: Docket Nos. FMCSA 98-3297[-279], 3298[-254], and 3299[-259] *Request to File Late-filed Comments*

TRANSMITTED BY FACSIMILE - HARD COPY TO FOLLOW

Dear Deputy Administrator Cirillo:

California Attorney General Bill Lockyer, acting in his independent capacity to protect the natural resources of the State of California, asks to file these comments on the regulations proposed by the Federal Motor Carrier Safety Administration (FMCSA) that would allow facilitate, and regulate the entry and operation of Mexican carriers in the United States. The

undersigned, on September 26, 2001, at 10:40 a.m. Pacific Daylight Time, spoke with Ms. Valerie Height of the FMCSA, who advised me that your agency is continuing to accept late-filed comments, although she cautioned me that the agency might not be able to consider fully comments filed at this point.

Attorney General Lockyer respectfully submit these comments pursuant to his independent authority to protect the public interest under the California Constitution, common law, and statutes. Along with other California agencies, the Attorney General has the power to protect the natural resources of the State from pollution, impairment, or destruction. (*See* Cal. Const., art., V, § 13, Cal. Gov. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal 3d, 14-15.) These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

We emphasize at the outset that Attorney General Lockyer does not make these comments in any attempt to prevent Mexican trucks from operating in California when FMCSA has fully complied with statutes and regulation applicable to these regulations. We do not seek to exclude trucks owned by Mexican carriers, but we do seek to have the full environmental and fiscal effects of the proposed regulations analyzed, disclosed, and where possible, mitigated pursuant to the National Environment Policy Act, the Clean Air Act, and the Unfunded Mandates Act before the regulations are issued in final form and become effective.

Our office has reviewed the proposed regulations and Regulatory Analysis. We believe that the proposal, contrary to FMCSA's analysis, is a major federal action with the potential significantly to affect the environ-

ment, and that, as such, it must be the subject of full environmental analysis pursuant to the National Environment Policy Act (NEPA), 42 U.S.C. 4321, et seq. Based upon our own, very preliminary analysis, we believe that the FMCSA must prepare a full environmental impact statement (EIS) on the proposals before they can be published in final form. Further, we believe that the FMCSA must prepare a full environmental impact statement (EIS) on the proposals before they can be published in final form. Further, we believe that the FMCSA must prepare and publish a conformity determination, as required by the federal Clean Air Act, 42 U.S.C. § 7506 for the actions that would be permitted and facilitated by the proposed regulations before those regulations may be finally adopted. Finally, we do not believe that the existing Regulatory Analysis supports the finding by FMCSA that the proposed regulations do not violate the Unfunded Mandate Act, and that additional documentation and support for that finding is required before the proposed regulations may be issued in final form. Each of these statutes is discussed more fully below.

National Environmental Policy Act

Allowing Mexican carriers to enter and operate in the United States beyond the existing commercial zone is a change to the status quo that will increase significantly the emission of air pollutants from Mexican trucks in this country, and in California where such trucks are driven in California. The pollutants whose emission will increase include both criteria pollutants such as oxides of nitrogen, and toxic pollutants. Oxides of nitrogen are designated as a criteria pollutant by the Clean Air Act and regulations issue pursuant to it. 42 U.S.C. §7409(a) and (c); 40 C.F.R. § 50.11. The Califor-

nia Air Resources Board has designated particulate exhaust from diesel engines as a toxic air contaminant[1], and diesel engine exhaust is listed as a chemical known to the State of California to cause cancer, pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65).[2] The proposed regulations, by allowing the operation of hundreds, perhaps thousands, of trucks in California each day that do not currently operate here, trucks that are not subject to the full panoply of emission control requirements to which California trucks are subject, will allow concomitant increases in pollutant emissions from those trucks.

NEPA's requirements are simple, clear, and apply here. NEPA was passed to ensure that "environmental concerns be integrated into the very process of agency decisionmaking." *Andrus v. Sierra Club*, 442 U.S. 347, 351; 42 U.S.C. 4321. It requires that an Environmental Impact Statement (EIS) be prepared for all "major Federal actions significantly affecting the quality of the quality of the human environment." 42 U.S.C. § 4332(2)(C). If an agency is not sure whether the action requires preparation of an EIS, it must first prepare an Environmental Assessment (EA) to determine whether the action will have a significant effect on the environment. 40 C.F.R. § 1501.4; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). If the EA establishes that the agency's action may have a significant effect upon the . . . environment, then the agency must prepare an EIS on the action. *Foundation for North American Wild*

[1] Cal. Code of Regs., tit. 17, sec. 93000.

[2] Cal. Code of Regs., tit. 22, sec. 126000.

Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982). If it is clear from the EA that the action will not have such a significant effect, the agency issues a Finding of No Significant Impact (FONSI), *see Blue Mountains*, 161 F.3d at 1212 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). The record here does not show that FMCSA performed an EA, or issued a FONSI.

We believe that it should have. The increased air pollution that will result from allowing Mexican carriers to operate outside the existing commercial zone is a major federal action with more than significant potential to harm the human environment. The Notice of Proposed Rule Making states that "the proposed action does not require any environmental assessment" and the Regulatory Analysis states explicitly that it does not discuss environmental issues. We therefore do not know the basis upon which FMCSA has made its finding that the proposed regulations do not constitute a major federal action significantly affecting the environment. Because our own analysis leads us to conclude that the proposed regulations will significantly harm the environment, we believe that FMCSA must prepare a full EIS in order to comply with NEPA. At the very least, the agency must prepare an EA. If the EA leads FMCSA to again conclude that the proposed regulations have no significant potential to harm the environment, the agency must issue a FONSI setting out the reasons, backed up by documentation and analysis, to support that conclusion. To this point, FMCSA has done neither, placing it in violation of NEPA.

In making an evaluation of the potential effects on the environment of the proposed regulations, FMCSA must consider not only the effects in the immediate

future, but those that are reasonably foreseeable over the medium and longer term. "Crystal-ball" analysis of uncertain future consequences is not required by NEPA, but a projection of environmental effects from the federal action that can be predicted with reasonable certainly is required. 40 CFR § 1508.17. This is particularly true for air pollution, where planning horizons for State Implementation Plans (SIP) stretch one to two decades into the future. 42 U.S.C. § 7511. It is in this context that FMCSA must determine whether the proposed regulations are a major federal action significantly affecting the environment.

The regulations isued by the Council on Environmental Quality (CEQ) to interpret NEPA provide that whether an action can be considered "significant" depends on many factors, including "the degree to which the proposed action affects public health and safety" and "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 CFR 1508.27, (2) and (10). Here, the increased diesel engine emissions that will be caused by authorizing Mexican trucks to operate freely outside the commercial zone will result in increased human exposures to diesel exhaust as a whole, and increased human exposure to known carcinogens, such as benzene, that are constituent chemicals in diesel exhaust. These emissions will cause an increase in the risk of cancer and other human health damage. The CEO regulations also provide that the significance of an action should be judged in context. 40 C.F.R. § 1508.27(a). In California, the increase in diesel exhaust emissions will worsen exposure in areas where there is already very considerable exposure to diesel

exhaust, such as the South Coast Air Basin.[3] As an indication of how severe the diesel exposure problem currently is, last year the south Coast Air Quality Management District (SCAQMD), the agency that is responsible to reducing air pollution in the greater Los Angeles metropolitan areas, adopted rules that will require public agencies from school districts to sanitation agencies in that air basin to spend cumulatively millions of dollars to buy low-polluting buses and trucks as they replace or augment their fleets, in an attempt to reduce diesel emissions, emissions of the very type that the Mexican trucks will increase. The increase in diesel emissions in such heavily polluted air basins as the South Coast Basin and the San Joaquin basin that a significant influx of additional trucks will cause must be considered significant, and requires full environmental analysis.

Further, the Mexican trucks will also emit increased oxides of nitrogen, one of the precursors of photochemical ozone pollution (what is commonly referred to as smog). This impact will be significant in the South Coast Basin, one of only two areas of the country with an "extreme" ozone problem.[4] Any increase in emissions of oxides of nitrogen in that air basin may make it virtually impossible for California and the SCAQMD to amend the SIP and craft regulations that will allow the basin to meet federal air quality standards. Such an impact is significant, and on its own requires a full environmental analysis.

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[3] See Los Angeles *Times*, January 13, 2000 (Metro Section), and Orange County *Register*, February 5, 2001.

[4] The other extreme ozone area is Houston, Texas.

As a threshold matter, we do not believe that FMCSA has provided a sufficient basis in fact to support its estimates, whether high, medium, or low, of the number of carriers currently operating in the commercial zone, or operating without appropriate regulatory documentation, *during the moratorium*, and has assumed that the universe of Mexican carriers wishing to operate in the United States will not greatly increase when the moratorium ends. With respect, we do not believe that this assumption has been adequately supported. When the moratorium is lifted, a new, legal market for transport will open to Mexican carriers, and we believe that more documentation of the numbers of carriers that may apply for OP-1 or OP-2 status must be provide before FMCSA may rely on its extremely low estimate of the numbers of carriers that will take advantage of the proposed regulations to enter the U.S. Such documentation should include economic analyses of the transport market in Mexico, and analysis of the possible entry into the Mexican market of foreign companies, including the possibility of American trucking companies establishing Mexican firms or affiliates.

We are aware that, in many respects, the emission standards for *new* Mexican trucks are the same as California standards. However, this is misleading; there are many differences that will cause the Mexican commercial carrier *fleet*, which includes far more older than new trucks, to emit greater amounts of particulate and nitrogen oxide emissions than California trucks. We have had a preliminary examination of the differences made, and summarize the most significant ones below. The technical report from which these facts are drawn will be submitted under separate cover:

1. Mexican trucks were not subject to emissions control regulations prior to 1993, while federal[5] and California trucks were subject to such regulations as of 1987. Thus, while current emissions standards for California and Mexican trucks may be the same (at least, on paper), there were no regulations to ensure, and no assurance is possible, that Mexican trucks manufactured before the advent of emissions regulations in Mexico are controlled to the same level that 1987-93 federal and California trucks are.

2. The overall emission from any given fleet depend to a large degree on the ages of the vehicles that comprise the fleet. Here, not only were Mexican trucks not subject to emissions standards prior to 1993, but the Mexican fleet is, as a whole, of a far greater average age than the federal or California fleet. That is, there is a much higher percentage of vehicles in the Mexican fleet that are older than ten years than there is in the federal or California fleet, a higher percentage that is older than 20 years, and so on, including a higher percentage of trucks that are forty-five years old[6] than can be found in the federal or California fleet. The greater age of the Mexican fleet makes it higher-emitting as a whole.

3. Specifically, the Mexican fleet emits more nitrogen oxides than the California fleet, and will con-

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[5] This letter uses the term "federal" to refer to trucks and buses that were certified to federal standards issued by the U.S. Environmental Protection Agency, and "California" to refer to trucks and buses certified to California's emissions standards by the California Air Resources Board.

[6] As seen in the Mexican trucks now being operated in Imperial and San Diego Counties in California, within the existing commercial zone.

tinue to do so into the future. For the year 2010, the Mexican fleet will emit between 10% and 68% more nitrogen oxides than the California fleet, depending on the age distribution of the Mexican fleet at that time. The situation is even worse for emissions of particulates (the chief cancer risk): in 2010, the Mexican fleet can be expected to emit between 17% and 80% more than the California fleet, again depending on the age distribution of the Mexican fleet. These figures alone constitute a potential for significant environment impacts, and require preparation of an EIS on the proposed regulations.

4. As background, and as the FMCSA must be aware, heavy-duty truck engines are often, perhaps usually, rebuilt during the life of the vehicle. Recently, the U.S. EPA and the California Air Resources Board (CARB) entered into a consent decree with major manufacturers of heavy-duty diesel engines. This consent decree requires that, when heavy-duty engines are rebuilt in the U.S. (including California), they must be rebuilt using low-nitrogen oxide kits supplied by the settling manufacturers. These kits will lower nitrogen oxide emissions from the levels emitted when the trucks were new. However, Mexican trucks are not subject to the consent decree. Presumably, these trucks will be rebuilt with standard techniques, and not using the low-nitrogen oxide kits. Certainly, there is no regulatory requirement that they be rebuilt with low-nitrogen oxide rebuild kits, and FMCSA has no basis to assume that they will be. Accordingly, as truck engines are rebuilt, nitrogen oxide emissions from Mexican trucks will be greater than the corresponding emissions from California trucks of the

same model year, and that difference will continue throughout the life of the rebuild. The current expectation is that the rebuilt trucks will emit about 36% less than the pre-rebuild trucks, meaning that Mexican trucks will emit about 36% *more* than corresponding California trucks from the date of rebuild for the life of the rebuild.[7] Again considering how long Mexican trucks tend to be driven, this will constitute a continuing, and significant, increase in emissions over time, and will harm the environment in which the trucks are driven. In the South Coast Basin, such an increase in nitrogen oxides emissions over currently projected emissions (i.e., those now expected from the operation the truck fleet as it is currently configured in the area) will endanger the attainment of federal and state air quality standards for many years into the future. This constitutes another significant impact that requires an EIR.

5. California has in place a diesel inspection and maintenance program, to ensure that diesel engines in trucks and buses have their emissions control systems periodically inspected, and properly maintained. This program applies only to California diesels, and has been shown to reduce particulate emissions by about 30% on a fleetwide basis, and up to 50% in the case of vehicles that fail roadside tests. Because the program does not apply to Mexican trucks, those trucks will emit, and continue over time to emit, proportionately more than the California trucks that are subject to the program.

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[7] *Development and Use of Heavy-Duty Nox Defeat Device Emission Effects for MOBILE5 and MOBILE6*", M6HDE Report, US EPA, October 1999.

6. Emission from the trucks and buses are directly related to the fuel they burn. Federal and California regulations are now moving to limitations on sulfur in diesel fuel, limiting the sulfur content to 15 parts per million. There is no guarantee that Mexico will adopt and enforce a corresponding limitation on sulfur in diesel fuel available in Mexico. Since excess sulfur can permanently damage and corrupt emission control systems, the difference between California/federal fuel and Mexican fuel presents a serious potential for increased emissions from Mexico trucks.

This list illustrates the variety, and gives an indication of the number and magnitude, of the ways in which Mexican emission standards are not identical with California or federal emissions standards. It is clear that the Mexican truck fleet will emit significantly more nitrogen oxides and particulate matter than the California or federal truck fleets.[8] Before the proposed regulations allow these trucks to release this added pollution in California, FMCSA must comply with NEPA and prepare environmental documentation. We believe that a full EIS is required, and that the regulations cannot legally be finalized until this is done.

In addition to the air pollutant emission questions, we also believe that circumstances with respect to trans-

[8] While any individual carrier's truck may not emit a significant amount by themselves, the CEQ regulations at 40 C.F.R. sec. 1508.27(b)(7) require that actions be evaluated cumulatively with other actions to determine their significance. Thus, FMCSA is required to look at the cumulative emissions that would be caused by all the Mexican carriers' trucks that would increase their operations in California under the proposed regulations in determining whether the action is "significant."

portation of hazardous materials have changed since the time the regulations were proposed. As many news stories have reported, there may now be a terrorist threat from the deliberate misuse of hazardous materials, and terrorists may have sought licenses to transport such materials in order to release or otherwise do harm with them. We understand that your agency is now charged with making a thorough investigation of the potential for terrorist use of hazardous materials in transport. We respectfully suggest that this investigation ought to include an examination of the potential for transport of hazardous materials from Mexico, in Mexican carriers' trucks, and that the potential for harm to the environment from any release of such materials ought to be examined in the EIR that we believe is legally require for these proposed regulations.

The Clear Air Act

The Clear Air Act, 42 U.S.C. 7401, et seq., at 42 U.S.C. section 7506, forbids any federal agency from taking any action that is not conformity with the State Implementation Plans (SIP) that is the overall plan for meeting and maintaining federal air quality standards. This requirement proscribes all federal agencies from permitting or requiring any action that would cause pollutant emissions in excess of those emissions that have been projected and provided for by the States and local governments in the relevant SIP. This is known as "conformity" with the SIP, and all federal agencies are under the affirmative duty to evaluate their actions for such conformity. The FMCSA presents no conformity determination in its proposed rule making, and it does not appear that any was performed. The Clear Air Act makes a consistency determination the affirmative responsibility of federal agency. *Environmental De-*

fense Fund v. EPA, 167 F.3d 641, 643 (D.C. Cir. 1999).[9] Without repeating the list of reasons why the Mexican fleet will emit significant greater amounts of nitrogen oxides than the federal or California fleets, as set forth above, the numbers set out in this letter show that emissions increases to be expected from Mexican trucks are sufficiently large as to be inconsistent with the current emissions inventory and emissions "budget" reflected in the California SIP. This requires a conformity determination by FMCSA, and that determination must be done prior to final agency action, i.e., prior to the issuance of final regulations. We are concerned both with the potential adverse health effects of the increased emissions and with fairness. The ozone problem in California's South Coast Air Basin is truly extreme, and sources that contribute only perhaps one-tenth of one percent of the total pollution inventory are often considered significant. Sources that are not controlled at all in less polluted areas are tightly regulated in the South Coast Basin.[10] The additional emissions put out by Mexican carriers' trucks will require equivalent decreases in emissions from some other source or sources, putting additional burdens on already heavily regulated California industries. Before the regulations are issued that would require such sacrifices from

[9] Although the *EDF* case dealt with transportation projects, consistency is a requirement imposed on all federal agencies and activities.

[10] In the South Coast Air Quality Management District, controls have been enacted on consumer products such a spray deodorants, bakeries, and pleasure boats, all sources whose control was not anticipated even a few years before. Daniel Selmi, *Impacts of Air Quality Regulation on Economic Development*, 13 Fall Nat. Resources & Env't 382 (1998).

California, FMCSA must perform and certify a full conformity analysis.

Unfunded Mandates Act

The Notice of Proposed Rule Making states that there will be less than $100 million in costs to tribes, states, localities, and the private sector from the carrying out of the proposed regulations, and that therefore the regulations do not fall under the requirements of the Unfunded Mandates Act Reform Act of 1995. 2 U.S.C. § 1532, et seq. With all due respect, we do not believe that FMCSA has provided sufficient documentation to support this conclusion. It is clear from the proposed regulations that FMCSA will rely upon border or roadside inspections to determine whether Mexican carriers are actully complying with the safety programs whose documentation FMCSA reviews. However, the Government Accounting Office and the Department of Transportation's own Inspector General have made clear in recent reports that federal inspection of Mexican trucks is woefully underfunded, and that the greatest part of the burden of inspection falls on the States.[11] We believe that FMCSA must develop and disclose a reasonable estimate, supported by appropriate documentation, of the number, length, and cost of inspections, both at the border and at the roadside, that States will be required to perform in order for the federal regulations to provide the assurance of compliance that FMCSA projects and relies upon in calculat-

[11] DOT Office of Inspector General, *Interim Report on Status of Implementing the North American Free Trade Agreement's Cross-Border Trucking Provisions*. IG Report No. MH- 2001-059 (May 8, 2001); General Accounting Office, *Commercial Trucking, Safety and Infrastructure Issues Under the North American Free Trade Agreement*, GAO No. RCED-96-61 (February, 1996)

ing the benefits and burdens of the proposed regulations. FMCSA must assure, pursuant to 2 U.S.C. § 1535, subdivision (a), that the alternative regulatory approach that is least burdensome alternative to the States has been chosen. The Inspector General's report cited above shows that California now performs the most inspections of Mexican trucks crossing the border, and we anticipate that it is on California that the greatest burden of inspection will fall under the proposed regulations. FMCSA is obligated under the Unfunded Mandates Act to properly calculate and disclose the extent of this burden, and to ensure that it has used the least burdensome regulatory approach. We do not believe that FMCSA has complied with these requirements.

Conclusion

Grave and serious questions about public health, environmental harm, potential for terrorism, and financial impacts on already stretched State budgets are presented by the proposed regulations, and have not been adequately analyzed or answered by FMCSA. We believed that the regulations cannot be lawfully adopted in final form until the statutes discussed above have been fully complied with. Attorney General Lockyer thanks the FMCSA for the opportunity to file these comments, and we hope that FMCSA will fully consider them and carry out the actions we have requested herein, including preparation of an EIR, preparation of a conformity determination, and revision of the Unfunded Mandates analysis.

Please feel free to contact my office with any questions.

Sincerely,

/s/ SUSAN L. DURBIN
SUSAN L. DURBIN
Deputy Attorney General

For BILL LOCKYER
Attorney General

United States General Accounting Office

GAO Report to Congressional Requesters

December 2001

NORTH AMERICAN FREE TRADE AGREEMENT

Coordinated Operational Plan Needed to Ensure Mexican Trucks' Compliance With U.S. Standard

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GAO-02-238

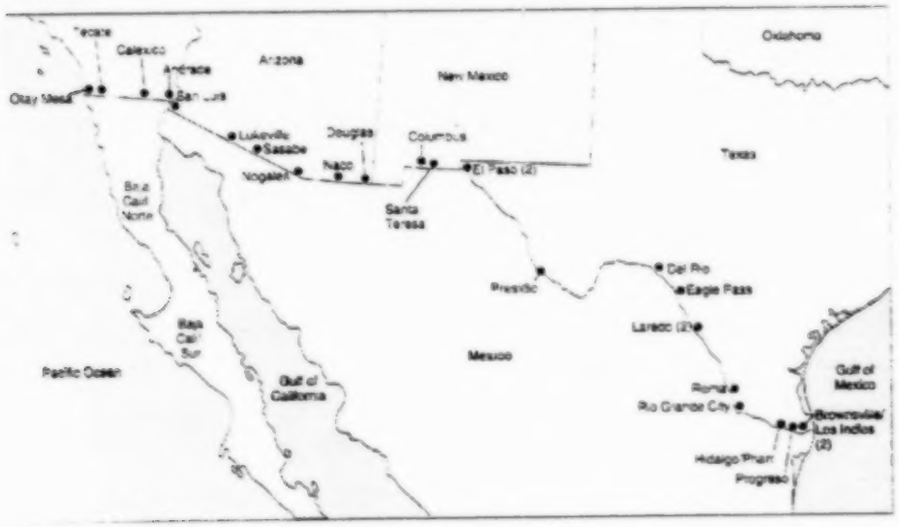
* * * * *

BACKGROUND

Since NAFTA's implementation, trade between the United States and Mexico has more than doubled, growing from $100 billion in 1994 to $248 billion in 2001.[12] Enhanced trade has increased the number of northbound truck crossing from 2.7 million in fiscal year 2001. According to DOT, about 80, 000 trucks crossed the border in fiscal year 2000, 63,000 of which were estimated to be of Mexican origin. Trucks from Mexico enter the United States at border crossing points in four U.S. states (see fig. 1), but most of the crossings occurred at five ports entry in fiscal 2001: Laredo, El Paso, Hidalgo/Pharr in Texas, and Calexico and Otay Mesa in California.

[12] NAFTA was agreed to by Canada, Mexico, and the United States in 1992 and implemented in 1994.

Figure 1: Commercial Ports of Entry Along the U.S.-Mexico Border



Note: Numbers in parenthesis indicate the number of ports of entry for those with more than one.

Source: GSA and DOT.

Commercial truck traffic at Texas and California ports of entry, which handle approximately 91 percent of truck crossings from Mexico, has grown just over 60 percent since NAFTA went into effect. Table 1 lists the principal commercial ports of entry and the number of truck crossings that occurred at each port in fiscal year 2001.

Table 1: Truck Crossings From Mexico into the United States, Fiscal Year 2001

Location	Truck Crossing	Percentage of total crossing
Texas		
Laredo	1,419,165	33%
El Paso	656,257	15
Hidalgo/Pharr	367,991	9
Brownsville	255,231	6
All Others	223,159	5
Total Texas	2,921,803	68
California		
Otay Mesa	700,453	16
Calexico	259,174	6
All others	63,970	1
Total California	1,023,597	23
Arizona		
Nogales	251,474	6
All others	90,424	2
Total Arizona	341,898	8
New Mexico	34,851	1
Total	4,322,149	100%

Source: U.S. Customs Service.

Under NAFTA, barriers have gradually been reduced for trade in goods and services among Canada, Mexico, and the United States. Among other things, NAFTA allows Mexican commercial vehicles greater access to U.S. highways to facilitate trade between the two countries. Under NAFTA's original timeline, Mexico and the United States agreed to permit commercial trucks to operate within both countries' border states no later than December 18, 1995, and beyond the border states by January 1, 2000.[13]

However, due to U.S. concerns about the safety of Mexican trucks and the adequacy of Mexico's truck safety regulatory system, the United States postponed implementation of NAFTA's cross-border trucking provisions and only permitted Mexican trucks to continue to operate in designated commercial zones within Arizona, California, New Mexico, and Texas.[14]

DOT's Office of Inspector General and GAO have reported that out-of-service rates for Mexican trucks operating in the commercial zones exceeded those of U.S. trucks in the nation as a whole. The Inspector General has also reported that the percentage of Mexican trucks placed out-of-service in the commercial zones declined from 44 percent in fiscal year 1997 to 36 percent in fiscal year 2000.

[13] Canada and the United States have permitted each other's truck complete access to all highways since 1982.

[14] Commercial zones are designated areas where Mexican commercial vehicles are allowed to (1) transfer their cargo to U.S. carriers or (2) unload their cargo for later pick-up by U.S. carriers. Commercial zones generally encompass areas extending between 3 and 20 miles north of U.S. border cities.

In 1998, Mexico challenged the United States' delay in implementing NAFTA's schedule for cross-border trucking. In February 2001, a NAFTA arbitration panel ruled that the United States' blanket refusal to review and consider Mexican motor carrier applications for operating authority to provide cross-border trucking services beyond the commercial zones violated its NAFTA obligations. The panel indicated that under NAFTA, the United States is permitted to establish its own safety standards and ensure that Mexican trucking firms and drivers comply with U.S. safety and operating regulations. However, the panel also noted that due to differing regulatory regimes in each country, the United States need not treat Mexican carriers or drivers exactly the same as those from the United States or Canada, provided that such different treatment is imposed in good faith with respect to a legitimate safety concern and conforms with relevant NAFTA provisions.

In February 2001, the administration announced that it would comply with its NAFTA obligations and allow Mexican commercial carriers to operate beyond the commercial zones by January 2002. In May 2001, DOT issued three proposed rules that would revise existing regulations and application forms and establish a two-tiered application process for Mexican carriers seeking authority to operate within and beyond the commercial zones.[15] Under the proposed rules, a carrier's authority would be conditioned on satisfactory completion of a

[15] Among other things, the rules would require carriers to (1) describe their operations, (2) self-certify that they understand and will comply with U.S. safety standards, and (3) describe their recordkeeping procedures relating to drivers and accidents.

safety audit within 18 months of receiving conditional operating authority.[16]

* * * * *

The small scale and size of Mexican trucking operations could also limit travel beyond the commercial zones. Mexico's truck fleet is relatively small compared with that of the United States, and Mexican trucking association representatives said that their members' fleets have fewer trucks than their U.S. counterparts. For example, there are nearly 600,000 trucking companies with approximately 6.3 million tractors and trailers in the United States, according to DOT. Mexico, in contrast, in 2000[10] had approximately 83,000 federally registered commercial cargo carriers with approximately 277,000 tractors and trailers (trucks may also be registered by Mexican states if they do not drive on federal highways).[11] Further, the overall age of the Mexican commercial vehicle fleet may also limit the number of Mexican carriers able to operate beyond the commercial zones. According to Mexican registration data, in 2000 only 20 percent of the commercial cargo trucks registered for use on Mexican federal highways were manufactured after 1994. Mexican industry officials told us that trucks manufactured in Mexico prior to this date were not built to U.S. safety and emissions standards. Mexican carriers can apply to have older

[16] These safety audits are expected to focus on reviewing a carrier's records and not individual truck inspections.

[10] Secretariat of Communication and Transportation, *Estadistica Basica del Autoransporte Federal.* (Mexico City, Mexico: 2000).

[11] An additional 23,000 vehicles of all types are operated by private trucking companies. Private trucking companies own and operate their own fleet.

vehicles certified to be in compliance with U.S. safety standards. However, Mexican industry officials told us that these vehicles might have difficulties meeting U.S. emissions standards.

Uncertainty about DOT's final rules for obtaining operating authority has reduced the number of Mexican carriers that will initially apply for authority to operate beyond the commercial zones, according to Mexican government and private sector representatives. According to these officials, this uncertainty makes it difficult to plan for the future since union contracts allowing traveling beyond the commercial zones and distribution ties must be established in advance.

Emissions Inspection of Commercial Trucks Vary by State

Under the 1990 Clean Air Act, EPA is required to establish minimum national standards for air pollution and individual states are assigned primary responsibility to ensure compliance with the standards through state implementation plans. Such plans can include truck emissions inspections. Since 1994, EPA's primary role in regulating commercial truck emissions has been to certify compliance of commercial truck engines at the factories where they are manufactured. EPA relies on the commercial truck engine manufacturers to certify that their products meet air emissions standards and conducts spot checks at engine factories.

Some U.S. states have implemented emissions testing requirements for heavy-duty diesel trucks as part of their efforts to meet EPA air quality standards for non-attainment areas.[12] State testing programs differ

[12] EPA defines a non-attainment area as a geographical region that exceeds scientifically accepted levels for certain air pollutants.

significantly, with some states requiring yearly checks of trucks and others operating both annual and more frequent roadside inspection programs. California, which has a large number of areas that do not meet federal air quality standards, including the state's two southern border counties, conducts emissions tests at the border. Since 1999, California has assigned two inspectors each to the ports of entry at Calexico and Otay Mesa to monitor the emissions of U.S. and Mexican heavy-duty vehicles. According to California state officials, in 2000, the failure rate for U.S. trucks was approximately 8 percent, while the failure rate for Mexican trucks was 12 percent.

Arizona also operates an emissions testing program for commercial trucks, but testing is conducted on a yearly basis for trucks registered in the state's two non-attainment areas, Phoenix and Tucson-neither of which are located at the border. Neither Texas nor New Mexico performs emissions inspections at the border.

[FMCSA-98-3297-2]
[FMCSA-98-3298-1]
[FMCSA-98-3299-1]

NORTH AMERICAN FREE TRADE AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

IN THE MATTER OF

CROSS-BORDER TRUCKING SERVICES

(Secretariat File No. USA-MEX-98-2008-01)

Final Report of the Panel

February 6, 2001

Panel Members:

J. Martin Hunter (Chair)
Luis Miguel Diaz
David A. Gantz
C. Michael Hathaway
Alejandro Ogarrio

* * * * *

B. The United States' Contentions

153. According to the United States:

> [t]he Mexican safety regime lacks core components, such as comprehensive truck equipment standards and fully functioning roadside inspection or on-site review systems. In light of these important differences in circum-stances, and given the experience to-date with the safety compliance record of Mexican trucks operating in the U.S. border zone, the United States decision to delay processing Mexican carriers' applications for operating authority until further progress is made on cooperative safety efforts is both prudent and consistent with U.S. obligations under the NAFTA.[142]

154. Thus, the United States is not obligated to grant Mexican trucking firms operating authority when there are not yet adequate regulatory measures in place in Mexico to ensure U.S. highway safety.[143] The United States asserts "that NAFTA contains no such requirement. To the contrary, under NAFTA's national treatment and most-favored-nation obligations, a NAFTA Party may treat service providers differently in order to address a legitimate regulatory objective."[144]

155. According to the United States, Mexican carrier safety cannot be assured on a case by case basis: "A carrier-by-carrier approach, however, cannot

[142] USPHS at 2-3.

[143] USCS at 2.

[144] USCS at 2.

> effectively ensure safety compliance by Mexican motor carriers operating in the United States. Rather, as the United States has explained, highway safety can only be assured through a comprehensive, integrated safety regime. It is for this reason that the United States is working with Mexican officials to develop comparable motor carrier safety systems."[145] Nor can the United States, as a practical matter, inspect every truck as it crosses the border.[146]

156. The United States notes the deficiencies of the Mexican oversight system:

> The Government of Mexico cannot identify its carriers and drivers so that unsafe conduct can be properly assigned and reviewed. While we understand that the Government of Mexico is engaged in an extensive effort to register all of its motor carriers and place them in a database that would facilitate the assignment of safety data, that database does not contain any safety data. Therefore, Mexico cannot track the safety fitness of its carriers and drivers. . . . Without such carrier safety performance history, the United States cannot conduct a meaningful safety fitness review of Mexican carriers at the application stage.[147]

157. The United States also contends that it would be futile to try to perform inspections of Mexican carriers in Mexico because "Mexican carriers are

[145] USPHS at 3.

[146] USPHS at 4.

[147] USPHS at 5.

not required to keep the types of records that are typically reviewed in these inspections." Even if an effort were made, it "could not be corroborated until the Government of Mexico develops and implements information systems to collect and make available that information."[148] Nor has there been any U.S. verification experience in Mexico: "The United States has never performed a compliance review or any other type of carrier or truck inspection in Mexico or issued any 'qualification or approval' to a Mexican carrier based on a visit to a carrier's offices."[149]

158. The United States also disagrees with Mexico's reliance on Article 105. According to the United States," the intent of Article 105 is simply to clarify that each NAFTA Party is responsible for ensuring that its state and provincial governments are in compliance with NAFTA obligations." Moreover, "Nothing in Article 105 suggests that measures entailing cooperation between NAFTA Parties are somehow forbidden or excluded."[150]

159. The United States (and Canadian) truck safety programs are the key to providing like circumstances in which trucks operate: they "provide a

[148] USPHS at 6.

[149] USPHS at 7. Although the United States asserts that it has never been able to perform compliance reviews in Mexico, Mexico disputes this fact. In its initial submission, Mexico observed that in 1997, USDOT officials, accompanied by Mexican officials, did indeed make visits to several Mexican motor carriers. According to Mexico, these U.S. officials were satisfied with the conditions they found during these inspections. MIS at 44-45.

[150] USSS at 19-20.

high degree of assurance that U.S. and Canadian trucks operating on U.S. highways each day meet minimum safety standards." The principal elements of the U.S. truck safety program include:

> a comprehensive system of rigorous vehicle and operator safety standards; enforcement through road side inspections and onsite compliance reviews; strict record-keeping rules; electronic databases that promptly provide inspectors in the field with safety-related data on drivers and motor carriers; and a substantial commitment of enforcement resources and personnel.[151]

160. According to the United States," Adequate assurances of safety also require that Mexico, as Canada has done, adopt safety controls within its own borders. The United States has been engaged in extensive cooperative efforts with Mexico to assist in the development of the Mexican safety system. Although Mexico has made substantial progress, work remains undone." Under these factual circumstances, "NAFTA's national treatment and most-favored-nation obligations do not, as Mexico argues, require the United States to treat Mexican trucking firms in the same manner as U.S. and Canadian firms."[152]

161. In particular, NAFTA does not obligate:

> the United States to license the operation of Mexican trucking firms in circumstances in which: (1) serious concerns persist regarding

[151] USCS at 2.

[152] USCS at 2-3.

their overall safety record; (2) Mexico is still developing first-line regulatory and enforcement measures needed to address trucking safety standards; and (3) essential bilateral cooperative arrangements are not fully in place.[153]

162. Moreover, the United States contends that under Rule 33 of the Chapter Twenty Rules of Procedure, the burden of proving violations of Article 1202 and 1203, is on Mexico, "including the burden of proving relevant regulatory circumstances and demonstrating that those circumstances are 'like'."[154]

163. The United States suggests that:

> to prove that a particular measure adopted or maintained by another NAFTA Party is inconsistent with Articles 1202 and 1203, the complaining Party must demonstrate each of the material elements of those [a]rticles. Those include showing: 1) the existence of one or more measures adopted or maintained by a Party; 2) that the measure(s) relate to crossborder trade in services; 3) the treatment accorded by the measure(s); 4) the extent to which that treatment may favor domestic, or certain foreign, service providers over the providers of the complaining Party; 5) the relevant "circumstances" under which that

[153] USCS at 35.

[154] USCS at 42.

> treatment is accorded; and 6) whether those circumstances are "like".[155]

164. Mexico is faulted for failing to address all of these elements: Most importantly, it has failed to describe the "circumstances" under which the United States is treating Mexican Firms for safety purposes. Moreover, Mexico has also neglected to demonstrate that those circumstances are "like" the circumstances that pertain to the regulation of U.S. and Canadian trucking companies.[156]

165. The inclusion of the qualifying "like circumstances" language "permits NAFTA Parties to accord differential, and even less favorable, treatment where appropriate to meet legitimate regulatory objectives."[157] The United States quotes with approval from Mexico's opening submission, "even if Mexican carriers were somehow not exactly 'like' U.S. and Canadian carriers, it was within the power of the United States to impose requirements that would make them 'like.'"[158] However, the United States differs with Mexico on the fundamental issue of whether "Mexican carriers are 'like' U.S. and Canadian carriers for purposes of applying NAFTA's national treatment and MFN provisions."[159]

166. The United States reviews the use of the term "like circumstances" in U.S. bilateral investment

[155] USCS at 39.

[156] USCS at 39.

[157] USCS at 39.

[158] MRS at 13.

[159] USSS at 6.

treaties, arguing that NAFTA language is derived fromthem, even though the BIT language is "in like situations."[160] Here and in the FTA, national treatment does not mean that a particular measure must in every case accord exactly the same treatment to U.S. and Canadian Service providers. Under paragraph three of FTA Article 1402, covered service providers from the two countries may be treated differently to the extent necessary for prudential, fiduciary, health and safety, or consumer protection reasons, as long as the treatment is equivalent in effect to that accorded to domestic service providers and the party adopting the measure provides advance notice to the other in conformity with Article 1803.[161]

167. According to the United States, NAFTA negotiating history confirms this earlier approach to the "in like circumstances" language, adopting "in like circumstances" on the understanding that it had similar meaning to "like services and services providers," as preferred originally by Canada and Mexico.[162]

168. Further support for the U.S. position is found in the U.S. Statement of Administration Action, which provides in pertinent part that "Foreign service providers can be treated differently if circumstances warrant. For example, a state may impose special requirements on Canadian and Mexican service providers if necessary to protect

[160] USSS at 6-7.

[161] USSS at 9-10, *citation omitted.*

[162] USSS at 11-12.

consumers to the same degree as they are protected in respect of local firms."[163] Similarly, the Canadian Statement of Implementation provides that " a Party may impose different legal requirements on other NAFTA service providers to ensure that domestic consumers are protected to the same degree as they are in respect of domestic firms."[164] Thus, "the 'like circumstances' language of Articles 1202 and 1203 makes clear that the United States may make and apply legitimate regulatory distinctions for purposes of ensuring the safety of U.S. roadways."[165]

169. The United States also contends that "The regulatory environment in which U.S., Canadian, and Mexican trucking firms operate is a critical 'circumstance' relevant to U.S. treatment of those firms because it helps to establish industry safety practices in the three countries. As elaborated in the Statement of Facts [of the U.S. submission], Mexican carriers in fact operate within a less stringent regulatory regime than that in place in either Canada or the United States."[166] The problem areas include driver hours of service: "U.S. and Canadian safety rules strictly limit drivers' hours of service. Mexican truck drivers are only governed by the more general rules of Mexican labor laws, with no safety regulation

[163] USCS at 40-41, *emphasis supplied by U.S.*

[164] USCS at 41.

[165] USCS at 42.

[166] USCS at 43.

directly applicable to the time a drivermay spend behind the wheel."[167]

170. Also, "U.S. and Canadian safety regulations require drivers to keep logbooks, the only practicable way to enforce hours of service regulations. Other than for hazardous materials, Mexico has no logbook requirements."[168] Moreover, "U.S. and Canadian safety regulations include exhaustive equipment regulations address to truck safety. Mexico, however, lacks specific regulations governing the condition and maintenance of CMV safety equipment."[169] Other problematic aspects of Mexico's motor carrier regulatory system relate to inspections by the motor carrier itself and government safety inspections.[170]

171. The United States observes that "[a]nother circumstance relevant to the treatment of U.S., Canadian, and Mexican trucking firms is the ability of U.S. transportation safety authorities to enforce U.S. safety regulations with respect to those carriers."[171] While the "maintenance of government databases of accident and safety records, with respect to both firms and drivers, is an important element of safety regulation in the United States (and Canada) . . . the United States has no access to similar data for Mexican firms ordrivers."[172] Moreover, "U.S. highway

[167] USCS at 43.

[168] USCS at 44.

[169] USCS at 44.

[170] USCS at 44.

[171] USCS at 45.

[172] USCS at 45.

safety regulators rely in part on their ability to conduct on-site audits and inspections of U.S. firms and, where appropriate, to impose civil or criminal penalties." However, "U.S. regulators have no right to conduct inspections or audits in Mexico, only limited and recent experience with Mexico on joint inspections (by contrast with a long track record with Canada), and limited ability to impose and collect civil or criminal penalties with respect to Mexican firms that might ignore U.S. safety regulations."[173]

172. A further major U.S. concern regarding "treatment of U.S., Canadian, and Mexican carriers is available evidence regarding the comparative safety records of firms operating in the United States. . . . Mexican trucks operating in the United States have a significantly higher incidence of being placed out of service for safety problems uncovered in random inspections. In particular, the available data show that the out-of-service rate for Mexican carriers is over 50 percent higher than the rate for U.S. carriers."[174]

173. In contrast to Mexico's system, the United States notes that "Canada's truck safety rules and regulations are highly compatible with those of the United States."[175] Thus, "when Canadian-based commercial trucks cross into the United States, federal and state transportation authorities can have a high level of confidence that those trucks comply with U.S. standards and require-

[173] USCS at 45.

[174] USCS at 45-46.

[175] USCS at 47.

ments at least to the same degree as U.S.-based trucks. That confidence level is bolstered by a fully functioning, computerized bilateral data exchange program."[176] Under these circumstances, "when Mexican trucks cross into the United States, there is no assurance that, based on the regulatory regime in place in Mexico, those trucks already meet U.S. highway safety standards."[177]

174. Given all of these considerations, the "United States has . . . concluded that the 'circumstances' relevant to the treatment of Mexican-based trucking firms for safety purposes are not 'like' those applicable to the treatment of Canadian and U.S. carriers."[178] Accordingly, "the United States may apply more favorable treatment to U.S. and Canadian trucking firms than to their Mexican counterparts without running afoul of Chapter Twelve's national treatment or most-favored-nation rules."[179]

175. The United States further notes that Mexico has presented no data on truck safety enforcement in Mexico, and states that although "Mexico does allege that 'it was within the power of the United States to impose requirements' that make Mexican carriers 'like' U.S. and Canadian carriers," Mexico has failed to explain "what those requirements might be nor how such requirements would

[176] USCS at 47-48.

[177] USCS at 48.

[178] USCS at 49.

[179] USCS at 49.

be practicable or effective."[180] According to the United States, "this absence of contrary evidence reinforces that the United States, in delaying the processing of Mexican applications until truck safety can be ensured, is acting reasonably, appropriately, and consistently with its NAFTA obligations."[181]

176. With regard to the question of whether high out-of-service rates for Mexican drayage trucks in the border zone are relevant to long-haul experience, the United States contends that "In terms of safety, the service provided by drayage trucks is no different from that provided by long-haul trucks–they haul goods on the same roads, through the same cities and towns through which long-haul trucks operate."[182] In any event, Mexico has not demonstrated that their long-haul trucks are safer. Issuance by the United States of long-haul authority to Mexican trucks "would not, standing alone, prevent a defective drayage truck from operating in the United States beyond the border commercial zone."[183]

177. The United States explains certain carriers are permitted to "transit" U.S. territory from Mexico to Canada because

> the Congress has not granted the U.S. Department of Transportation ("DOT" or "Department") the authority to require such transit carriers to seek operating authority. There-

[180] USSS at 3-4.

[181] USSS at 4.

[182] USPHS at 7.

[183] USPHS at 8.

> fore, transit operations are unaffected by the moratorium on the issuance of operating authority to Mexican motor carriers for operations outside the commercial zone. All firms operating in the United States, however, regardless of whether they are subject to such registration requirements, are subject to DOT's safety jurisdiction.[184]

U.S.-owned, Mexican-domiciled carriers and "grandfathered" carriers are unaffected by the statutory moratorium and thus are also permitted to transport goods from Mexico to the United States beyond the border zone.[185]

178. However, the United States does not believe that the exemption of these groups from the moratorium "demonstrates that the United States does not have authentic safety concerns about Mexican carriers."[186] "The number of carriers entitled to these exemptions represents only a small fraction–about two percent–of Mexican firms engaged in cross-border operations. Specifically, 8,400 Mexican firms have authority to operate in the commercial zones, while a total of only 168 Mexican carriers are entitled to the above discussed exemptions."[187]

179. Mexican motor carriers operating in the border commercial zones are required to obtain special certificates of registration. These carriers are fully subject to all U.S. safety regulations. They

[184] USSS at 20-21.

[185] USSS at 21-22, *citations omitted.*

[186] USSS at 22.

[187] USSS at 22.

must also have trip insurance, must carry evidence of the insurance in their trucks, and must have U.S. registered agents.[188] The United States denies that the use of trip insurance instead of continuous insurance reflects any lack of concern over differences in the safety of U.S. and Mexican carriers operating in the commercial zones. Rather, "[a]n insurer's potential liability arising from trip insurance is just the same as that arising from continuous insurance, and in both cases the insurer has the same incentives to reduce its potential liability."[189]

180. The United States also explains its alleged lack of concern with trailers: "In practice, however, the safety of Mexican trailer components has not been a major issue, because eighty to ninety percent of the trailers used in crossborder trade are in fact U.S.-owned."[190]

181. With regard to national treatment and most-favored-nation obligations, according to the United States,

> the relevant issue is whether the U.S. actions are consistent with its Chapter Twelve national treatment and MFN obligations in light of the different circumstances applicable to U.S. and Canadian trucking firms, on the one hand, and Mexican trucking firms on the other . . . it is acting reasonably and appropriately by delaying the processing of Mexican firms' applications for operating authority while U.S.

[188] USSS at 24.

[189] USSS at 24-25.

[190] USSS at 25-26.

and Mexican transportation officials work cooperatively to establish adequate safety enforcement tools to ensure that the grant of additional operating authority to Mexican firms does not undermine highway safety. Applying NAFTA's national treatment and MFN obligations to this set of facts turns on a close analysis of highway safety issues, not abstract arguments regarding "conditionality".[191]

182. According to the United States, Mexico has failed to meet its burden of proof regarding denial of investment benefits, "because Mexico had not shown that any Mexican national meets the definition of 'investor' in Chapter Eleven."[192] In this respect, the United States disagrees with Mexican reliance on WTO doctrines under which a complaining Party does not have to show trade impact. Moreover, the United States believes under WTO principles "complaining parties bear the burden of proving an alleged violation by a WTO Member of its WTO obligations."[193]

183. The United States, which emphasizes that it has not raised Chapter Nine as a defense,[194] also expresses its disagreement with Mexico's relating of the "in like circumstances" language to Chapter Nine. A NAFTA Party, according to the United States, does not need any NAFTA provision to serve as a "vehicle for" (which,

[191] USSS at 17.

[192] USSS at 26.

[193] USSS at 26-27, *quotation and citation omitted.*

[194] Comments of the United States on the Initial Report of the Panel, December 19, 2000, at 2.

presumably, Mexico means "to authorize") any particular governmental regulation. In applying governmental regulations, NAFTA only comes into play when a particular NAFTA obligation is relevant to the regulation at issue. Chapter Nine imposes certain obligations (such as MFN and national treatment obligations) with respect to standards-related measures, but Chapter Nine is not "the vehicle for application" of standards.

184. According to the United States, if Mexico's argument is predicated on the theory that only NAFTA Chapter Nine could "permit" differential treatment between domestic and foreign service providers, the argument is both circular and inconsistent with the plain text of the agreement.

185. Also, the United States contends that the Parties could not, as Mexico suggests, have intended Chapter Nine to serve as the exclusive "vehicle" for applying standards-related measures because the scope of Chapter Nine is limited to goods and only two services sectors: telecommunications and land transportation services. Chapter Nine does not apply to measures affecting any other services nor to measures affecting investment. Mexico's interpretation would lead to the untenable result that the Parties neglected to provide any "vehicle" for the application of standards-related measures applicable to most services covered by NAFTA and to all investments covered by NAFTA.[195]

[195] USSS at 14-16, *citations omitted.*

186. The United States contends that its position is confirmed by Article 2101, one of the general exceptions, which provides:

> that 'nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.'[196]

187. Similarly, in the Preamble to NAFTA, the Parties explicitly state their resolve under NAFTA to "preserve their flexibility to safeguard the public welfare."[197] "These provisions illustrate that NAFTA Parties contemplated that their regulatory authorities would retain their ability to make regulatory distinctions with regard to cross-border services trade necessary to protect human health and safety in their territories."[198]

188. The United States also contests Mexico's assertion that a government may not "condition[] . . . market access of its goods and services on the exporting country's adoption of the rules and laws of the importing country."[199] The United States disclaims the applicability of the unadopted

[196] NAFTA Article 2101(2).

[197] USCS at 40.

[198] USCS at 40.

[199] USPHS at 17, *quoting* Mexico.

GATT Panel report in Tuna,[200] and argues that the controlling case is the Appellate Body Report in United States - Import Prohibition of Certain Shrimp and Shrimp Products. It appears to the United States, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX of GATT 1994.[201]

189. The United States concludes, "Mexico has no support for its proposition that some general principle of international law prohibits the United States from taking account of the exporting Party's regulatory regime."[202]

190. The United States also asserts that Mexico has made no case for nullification or impairment under NAFTA Annex 2004, noting some similarity to the Korean Procurement case in the WTO.[203] According to the United States, Mexico has the burden of showing nullification or impairment and has made no such argument. Also, the United States declares that under NAFTA, a nullification or impairment claim may not be made if it

[200] *United States – Prohibition of Imports of Tuna and Tuna Products from Canada* (Report of the Panel adopted on Feb. 22, 1982, L/5198-29S/91 [hereinafter *Tuna*].

[201] USPHS at 17-18.

[202] USPHS at 18.

[203] USPHS at 10-11.

would be subject to an Article 2101 exception. As the United States has shown, differential treatment for Mexican carriers is warranted by safety concerns, and is thus consistent with the U.S. obligations under the national treatment and MFN provisions of Chapter Twelve. For the very same reasons, (and in the event that the Panel had needed to examine this issue in response to a nullification or impairment claim), the U.S. measure would fall squarely within the scope of Article 2101(2).[204]

191. The United States asserts that the "subjective" motivation for the alleged U.S. violations–as argued by Mexico–should not be the basis for the Panel's analysis. WTO Appellate Body decisions support the position of the United States that the pertinent issue here is whether safety concerns warrant the differential treatment provided to Mexican carriers, and not–as Mexico claims–the subjective motivations of U.S. decision-makers in December 1995.[205]

192. The United States cites to Japan - Alcoholic Beverages,[206] where the Appellate Body determined that "This is not an issue of intent" and determined "an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and

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[204] USPHS at 13.

[205] USPHS at 14-17.

[206] *Japan - Taxes on Alcoholic Beverages*, Panel Report adopted Oct. 4, 1996, WT/DS8/AB/R.

application of the measure in question on domestic as compared to imported products."[207]

193. Also, in Chile - Alcoholic Beverages,[208] the Appellate Body noted that

> The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives–that is, the purpose or objectives of a Member's legislature and government as a whole–to the extent that they are given objective expression in the statute itself, are not pertinent.[209]

194. Consequently, the Panel in this case should "likewise examine U.S. compliance with national treatment obligations based on a fact-specific analysis of the U.S. measure and all of the relevant circumstances, and not–as the Appellate Body wrote–on the 'subjective intentions inhabiting the minds of individual . . . regulators.'"[210]

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[207] *Id.* at 28-29, as cited in USPHS at 16.

[208] *Chile- Taxes on Alcoholic Beverages*, Panel Report adopted Dec. 13, 1999, WT/DS87/AB/R.

[209] *Id.* at para. 62, as cited in USPHS at 16, *emphasis in original.*

[210] USPHS at 17.

VII. FINDINGS, DETERMINATIONS AND RECOMMENDATIONS

A. Findings and Determinations

295. On the basis of the analysis set out above, the Panel unanimously determines that the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1202 (national treatment for cross-border services), and Article 1203 (most-favored-nation treatment for cross-border services) of NAFTA. An exception to these obligations is not authorized by the "in like circumstances" language in Articles 1202 and 1203, or by the exceptions set out in Chapter Nine or under Article 2102.

296. The Panel unanimously determines that the inadequacies of the Mexican regulatory system provide an insufficient legal basis for the United States to maintain a moratorium on the consideration of applications for U.S. operating authority from Mexican-owned and/or domiciled trucking service providers

297. The Panel further unanimously determines that the United States was and remains in breach of its obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1102 (national treatment), and Article 1103 (most-favored-nation treatment) to permit Mexican nationals to invest in enterprises

in the United States that provide transportation of international cargo within the United States.

298 It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the Panel imposing a limitation on the application of safety standards properly established and applied pursuant to the applicable obligations of the Parties under NAFTA. Furthermore, since the issue before the Panel concerns the so-called "blanket" ban, the Panel expresses neither approval nor disapproval of past determinations by appropriate regulatory authorities relating to the safety of any individual truck operators, drivers or vehicles, as to which the Panel did not receive any submission or evidence.

B. Recommendation

299. The Panel recommends that the United States take appropriate steps to bring its practices with respect to cross-border trucking services and investment into compliance with its obligations under the applicable provisions of NAFTA.

300. The Panel notes that compliance by the United States with its NAFTA obligations would not necessarily require providing favorable consideration to all or to any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S.

trucking regulations when operating in the United States. Nor does it require that all Mexican-domiciled firms currently providing trucking services in the United States be allowed to continue to do, if and when they fail to comply with U.S. safety regulations. The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis. U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is U.S., Canadian or Mexican.

301. Similarly, it may not be unreasonable for a NAFTA Party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it may be necessary to implement different procedures with respect to such service providers. Thus, to the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the United States may not be "like" those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable. However, if in order to satisfy its own legitimate safety concerns the United States decides, exceptionally, to impose requirements on Mexican carriers that differ from those on U.S. or Canadian carriers, then any such decision must (a) be made in good faith with respect to a legitimate safety concern and (b) implement differing requirements that fully conform with all relevant NAFTA provisions.

302. These consideration are inapplicable with regard to the U.S. refusal to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States, since both Mexico and the United States have agreed that such investment does not raise issues of safety.

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FRIENDS OF THE EARTHNATURAL RESOURCES DEFENSE COUNCIL**SIERRA CLUB**CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**

VIA FACSIMILE AND FEDERAL EXPRESS
Comment Clerk

U.S. Dept. of Transportation

Docket Management Facility, Room PL-401
400 Seventh Street, SW
Washington, DC 20590-0001

Re: Comments on Dockets:

1. Proposed Rules for the Revision of Regulations and Applications for Mexican-Domiciled Motor Carriers To Operate in U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border, Fed. Reg. Vol. 66, No. 86 (May 3, 2001). FMCSA-98-3297

2. Proposed Rules for the Application by Certain Mexican Motor Carriers To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.–Mexico Border, Fed. Reg. Vol. 66, No. 86 (May 3, 2001) FMSC-98-3298

3. Proposed Rules for a Safety Monitoring and Compliance Initiative for Mexican Motor Carriers Operating in the United State, Fed. Reg. Vol. 66, No. 86 (May 3, 2001) FMCSA-98-3299

Dear Comment Clerk:

These comments are submitted on behalf of Friends of the Earth, Natural Resources Defense Council, Center for International Environmental Law, and Sierra Club for inclusion in the dockets of each of the proposed rules and draft guidance referenced above.

Friends of the Earth ("FoE") is an environmental advocacy organization established in 1969 with U.S. offices in Washington, DC, Seattle, WA and Burlington, VT. Friends of the Earth has more than 20,000 members nation-wide, and is dedicated to protecting the planet from environmental degradation; preserving biological, cultural, and ethnic diversity; and empowering citizens to have an influential voice in decisions affecting the quality of their environment—and their lives. A major program of FoE is to advocate for appropriate consideration of environmental consequences stemming from free trade agreements.

The Natural Resources Defense Council ("NRDC") is a national nonprofit environmental organization with more than 500,000 members. Since 1970, our lawyers, scientists, and other environmental specialists have been working to protect the world's natural resources and to improve the quality of the human environment. NRDC has offices in New York City; Washington, D.C.; Los Angeles; and San Francisco.

The Sierra Club is a national environmental advocacy group, founded in 1892, with more than 700,000 members.

The Center for International Environmental Law ("CIEL") is a public interest environmental law organization founded in 1989 to bring the energy and experience of the public interest environmental law movement to the critical task of strengthening and developing international and comparative international environmental law, policy, and management throughout the world. Through its offices in Washington, D.C. and Geneva, CIEL's Trade Program works to ensure that the governance of trade and investment rules inte-

grates environmental protection and promotes sustainable development.

In these rules, the U.S. Department of Transportation's ("DOT") Federal Motor Carrier Safety Administration ("FMCSA") authorizes Mexican-owned trucks to operate on U.S. highways throughout the United States, including within and beyond communities on or near the U.S.-Mexico border. DOT's proposed action raises serious environmental issues that require appropriate consideration and mitigation where possible.

BACKGROUND AND SUMMARY

The comments of FoE, NRDC, Sierra Club, and CIEL concentrate on two concerns: 1) DOT must comply with the National Environmental Policy Act prior to finalizing these proposed rules, and 2) DOT must consider the disproportionate impact these rules will have on the health and safety of children pursuant to Executive Order 13045.

Beginning with the start of its implementation in 1994, The North American Free Trade Agreement ("NAFTA"), has liberalized trade among its signatories the United States, Mexico, and Canada. Among the many legal and policy changes NAFTA required of its signatories to take were new rules governing the shipment of goods and materials by truck. Specifically, NAFTA required that by 1995, Mexican trucks be permitted to drive throughout the U.S.-Mexico border states. NAFTA countries agreed to virtually completely open borders by requiring that trucks from any NAFTA country could drive anywhere in all NAFTA countries.

Limits on the operation of motor carries from Canada were lifted by a Presidential Memorandum from September 20, 1982. However, despite NAFTA's requirements, the Memorandum continued the moratorium for Mexican trucks, citing concerns over the safety of Mexican trucks. The U.S. only permitted them to travel in designated U.S. communities located with 20 miles of the U.S.-Mexico border. These designated communities are used by trucking companies to transfer freight among U.S. and Mexican trucks.

The procedures and regulations of the U.S. and Mexico which apply to motor carriers vary widely. The DOT grants motor carrier authority to operate through an application procedure, and regulates and enforces compliance with laws pertaining to safety and environmental issues through roadside inspections and compliance reviews at a truck company's place of business. Mexico's regulations are different than those in the U.S. as they relate to driver hours of service, driver logbooks, driver qualifications, transport and handling of hazardous substances, and equipment.

After several years of negotiations between Mexico and the U.S. to lift the U.S. moratorium were unsuccessful, on September 22, 1998, Mexico requested the formation of an arbitral panel to resolve the dispute pursuant to NAFTA Article 2008(1). On February 6, 2001, the arbitral panel issued its ruling *In the Matter of Cross-Border Trucking Services* (Secretariat File No. USA-Mex-98-2008-1). The arbitral panel ruled that the U.S. must allow Mexican commercial trucks to carry and deliver cargo throughout the U.S. or else pay trade sanctions for refusal to comply.

This increased truck traffic will result in significant impacts to the environment and raises serious safety issues, including, but not limited to, impacts to air quality, emissions of gasses that cause climate change,

transport, handling, and release of hazardous materials. For instance, less stringent air emission standards apply to Mexican trucks, including diesel fuel standards that allow a higher sulfur content. It is estimated that Mexican trucks produce higher levels of Nitrogen Oxides ("NOx"), volatile organic compounds ("VOC"), carbon monoxide ("CO"), particulate matter less than 10 microns ("PM-10")[1], and carbon dioxide (CO2).[2] In addition, major differences exist between US and Mexico regulations pertaining to the transport and handling of hazardous substances. Mexico's regulations, for example, do not provide detailed construction, inspection, and operating requirements for commercial motor carriers, such as the regulations in the U.S.

DOT MUST PREPARE AN ENVIRONMENTAL ASSESSMENT AND SHOULD PREPARE AN ENVIRONMENTAL IMPACT STATEMENT PRIOR TO FINALIZING PROPOSED FEDERAL RULES IMPLEMENTING THE NAFTA PANEL'S DECISION

DOT's actions will be arbitrary and capricious if it promulgates these proposed regulations without first complying with NEPA, Counsel on Environmental Quality ("CEQ") regulations, and DOT's own procedures.

Enacted in 1970, NEPA requires all federal agencies to identify the harmful effects of projects they undertake, fund, or approve and to consider adoption of

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[1] The release of smaller particulate matter is also released on average at a higher rate by Mexican trucks.

[2] *North American Trade and Transportation Corridors: Environmental Impacts and Mitigation Strategies*, North American Commission for Environmental Cooperation (February 21, 2001) at 9.

alternatives and mitigating measures that will avoid or reduce such impacts. To these ends, Section 102(2)(C) of the Act declares:

> The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—. . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action . . . ." 42 U.S.C. § 4332(2)(C).

This mandate is intended to "inject environmental considerations into the federal agency's decision making process" and "to inform the public that the agency considered environmental concerns in its decision making process." *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981). Because of its importance, the EIS provision only gives way in the face of a "clear and unavoidable conflict in statutory authority." *See Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 788 (1976).

To implement the EIS requirement and other provisions of NEPA, the CEQ issued regulations in 1978 that are binding on all federal agencies. 40 C.F.R. Parts 1500-1508. Those rules established certain basic requirements governing preparation and public review of an EIS, and they required each agency to publish its own rules to supplement those of the CEQ. 40 C.F.R. § 1505.1.

Environmental Impact Statements ("EIS") are required for any "major federal action significantly affect-

ing the quality of the human environment."[3] Accordingly, if the DOT decides to grant Mexican trucking companies motor carrier authority under existing regulations or under new regulations, it must determine whether such action constitutes "a major federal action significantly affecting the quality of the human environment." If the determination is affirmative, the agency will be required to prepare an EIS.

Currently, there is nothing in record supporting DOT's proposed decision not to comply with NEPA. If DOT is not certain that an EIS must be prepared, then it must first prepare an EA.[4] Such an assessment is to provide sufficient evidence and analysis for determining whether an EIS is needed, or a finding that the proposed federal action does not have significant environmental impact, and therefore no EIS is needed.[5] In preparing an environmental assessment, the agency must consult with other environmental agencies, applicants, and the public, "to the extent practicable."[6]

DOT's decision to not comply with NEPA is inconsistent with its own rules, CEQ regulations, and the statute itself. The Department of Transportation implemented its NEPA/CEQ requirements pursuant to an order ("DOT Order")[7] that sets out procedures for all constituent agencies within DOT, and delegates responsibility for full compliance to each constituent

[3] 40 C.F.R. §1502.3.

[4] 40 C.F.R. §1501.3(b).

[5] 40 C.F.R. §§ 1508.9(a)(1), 1501.4(b)-(c).

[6] 40 C.F.R. § 1501.4(b).

[7] Department of Transportation Order 5610.1C, as amended (July 30, 1985).

agency. The DOT Order applies to all rulemaking and regulatory actions, including notices of proposed rules.

Under the DOT Order, an EIS shall be prepared for "any proposed major federal action significantly affecting the environment."[8] The DOT also identifies a non-exhaustive list of categorical exclusions which do not require either an EIS or an EA. In addition, the DOT Order requires each constituent agency to provide further guidance and instructions to comply with NEPA (the "implementing instructions").

The implementing instructions may be either (i) detailed instructions or regulations issued by a constituent agency which provides guidance on applying environmental considerations to its programs;[9] or (ii) adoption of the DOT Order itself as its implementing instructions, plus the issuance of supplementary guidance which "at a minimum applies the environmental process to the administration's programs." The supplementary guidance must include, among other things:

- a list of actions which normally require preparation of an EIS,
- a list of actions which are not normally major Federal actions significantly affecting the environment and as such do not require an EA or EIS (*i.e.*, categorical exclusions), and
- identification of the decision-making process.[10]

Moreover, notwithstanding the foregoing, the implementing instructions must provide for the preparation

[8] *See also* 40 C.F.R. § 1502.3.

[9] DOT Order at pg 19, Subparagraph 20 (a)(1).

[10] *Id.* at pg. 20, Subparagraph 20 (b).

of an EA or EIS for actions that would otherwise be categorical exclusions, if those actions are likely to involve a significant impact on the environment or create substantial controversy.

The FMCSA, as a constituent agency within DOT, has not complied with these requirements in issuing its Proposed Rules. Rather, the Proposed Rules only say . . . . (something that indicates briefly how limited they are, then go into specifics of what they fail to do). It has failed to issue detailed instructions or regulations to provide guidance on its environmental process; nor has it adopted supplementary guidance to the DOT Order. It has failed to identify a decision-making process, a list of categorical exclusions, or a list of actions which normally require an EA or EIS. And, the FMCSA has failed to otherwise analyze these rules pursuant to NEPA. The FMCSA is therefore not in compliance with the DOT Order.

DOT may not base its decision that compliance with NEPA is not required for these regulations on the argument that the "impacts to the human environment" are a result of a decision to lift the moratorium on Mexico-owned trucks. The CEQ regulations define a "major federal action" under NEPA as, among other things, "systematic and connected agency decisions allocating agency resources to implement a specific statutory directive or executive directive." 40 C.F.R. § 1508.18(b)(3). CEQ also defines a "major federal action" as "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." 40 C.F.R. § 1508.18(a).

Accordingly, there is no doubt that these rules trigger the need for NEPA compliance.[11]

DOT MUST COMPLY WITH EXECUTIVE ORDER 13045 BECAUSE THE INCREASED POLLUTION AND SAFETY CONCERNS PRESENTED BY THESE RULES CAUSE A DISPROPOTIONATE RISK TO CHILDREN

DOT has determined that it need not prepare identify and assess the health and safety risks that these proposed rules could have on children. In each of the Federal Register notices at issue, DOT asserts that these proposed rules are "not economically significant" and do "not concern an environmental risk to health or safety that may disproportionately affect children." Sufficient evidence exists to compel DOT to reverse this determination, and complete the required analysis under Executive Order 13045.

The purpose of Executive Order 13045 is to assess and consider how federal actions and decision may disproportionately impact children. It requires that each federal agency "(a) shall make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children; and (b) shall ensure that its policies, programs, activities, and standards address disproportionate risks to children that result from environmental health risks and safety risks."[12] The Executive order requires that

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[11] DOT may not finalize these regulations prior to complying with NEPA. According to CEQ regulations, "no action concerning the proposal shall be taken which would: 1) Have an adverse environmental impact; or 2) Limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1.

[12] Executive Order 13045, Fed. Reg. Vol. 62, No. 78, (April 23, 1997).

for each regulatory action subject to it, agencies must conduct "an evaluation of the environmental health or safety effects of the planned regulation on children" and include "an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency."[13] These findings are to be submitted to the Office of Management and Budget's Office of Information and Regulatory Affairs for review.

Air pollution, especially particulate matter, affect children more seriously than others in the population. Several U.S. Environmental Protection Agency ("EPA") studies confirm this fact.[14] For instance, EPA finds that air pollution, such as ozone, particulate matter, carbon monoxide, nitrogen dioxide, and sulfur dioxide, "are particularly unhealthy for children." EPA finds that these pollutants cause a disproportionate risk to children because "children breathe more rapidly and inhale more pollutants per pound of body weight than adults, and their airways are more narrow than those of adults and their respiratory systems are still developing."[15] Therefore, an assessment of the risks these proposed rules present to children is required.

DOT has failed to address the disproportionate impacts the environmental health and safety risks resulting from these proposed rules. DOT's conclusory statement that these proposed rules do "not concern and environmental risk to health or safety that may disproportionately affect children" is not supported by the facts now in the record. Accordingly, DOT must

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[13] *Id.*

[14] *www.epa.gov/children/air.htm*

[15] *Id.*

prepare the analysis required by Executive Order 13045 prior to finalizing these rules.

CONCLUSION

DOT must comply with NEPA before finalizing these proposed rules that would allow Mexican-owned trucks to drive throughout the United States resulting in increased air pollution and other environmental hazards. The requirements for agency compliance with NEPA are outlined by the CEQ Regulations. The DOT Order outlines general NEPA procedures and then requires its constituent agencies to issue detailed instructions or supplementary guidance reporting environmental considerations. The FMCSA has not issued either detailed instructions or regulations on its environmental processes or supplemented the DOT Order, nor has it evaluated these rules under NEPA. Therefore, the FMCSA is not in compliance with either the DOT Order, the CEQ Regulations or NEPA.

In addition, the increased air pollution and other environmental risks resulting from these proposed rules presents health and safety risks that would disproportionately affect children. Therefore, compliance with Executive Order 13045 is required.

By failing to consider the environmental and health effects of these rules, both DOT and FMCSA violate NEPA and the Executive Order 13045. These rules

constitute agency action and must comply fully with the requirements of the law. Therefore, DOT should prepare the necessary analysis prior to issuing final rules.

Respectfully submitted,

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April 17, 2002

U.S. Department of Transportation
Dockets Management Facility
Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: 1. Docket No. FMCSA-98-3298; Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, Interim Final Rule; Request for Comments, 67 Fed. Reg. 12702 (2002)

2. Docket No. FMCSA-98-3299; Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, Interim Final Rule, Request for Comments, 67 Fed. Reg. 12758 (2002)

On behalf of the International Brotherhood of Teamsters, the California Federation of Labor, Public Citizen and Natural Resources Defense Council, we submit the following comments on the above-listed actions of the Federal Motor Carrier Safety Administration (FMCSA). Not only will these federal actions significantly increase the overall commerce by truck between Mexico and the U.S., thereby greatly increasing emissions of air pollutants beyond those

amounts that would otherwise be emitted, but they will also allow entry to thousands of Mexico-domiciled trucks, nearly all of which emit higher amounts of air pollutants than the U.S. trucks that they will displace.

These increased emissions will delay timely attainment of the national primary air quality standard (NAAQS) for photochemical oxidants (ozone) in several areas in California and Texas that are currently nonattainment for that standard, and they may delay the attainment of the national primary ambient air quality standard (NAAQS) for particulates (PM10) in several areas in California that are currently nonattainment for that standard. The increased emissions from the influx of Mexico-domiciled trucks allowed by the above-listed actions will also increase the frequency or severity of existing violations of the NAAQS for ozone and particulates. Further, the increased emissions from the Mexico-domiciled trucks will cause or contribute to new violations of the recently issued NAAQS for ozone and fine particulates.

FMCSA has prepared an Environmental Assessment (EA) that purportedly addressed the adverse environmental impacts of above-listed actions, and it has made a finding of no significant impact (FONSI) based upon that assessment. However, the EA is woefully inadequate and by no means supports the associated FONSI. We are enclosing for your review a technical report (hereinafter the "Sierra Research Report")[1], prepared by Sierra Research, a highly-re-

[1] The full title of the Sierra Research Report is "Critical Review of "Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment," Prepared by John A. Volpe Transportation Systems Center, January 2002" (Report No. SR02-04-01).

garded consulting firm that specializes in air pollution assessments on behalf of public and private clients. The authors of this report are recognized experts in the field of air pollution research, particularly from mobile sources. The resumes of the principal authors, James Lyons, Philip Heirigs, and Lori Williams, are enclosed for your consideration.

The Sierra Research Report demonstrates that the above-listed actions constitute a major federal action significantly affecting the quality of the human environment. As such, it is an action for which FMCSA must prepare a full-fledged Environmental Impact Statement ("EIS").

Moreover, aside from failing to prepare an EIS, FMCSA has not prepared a conformity analysis pursuant to section 176 of the Clean Air Act, 42 U.S.C. § 7506, so as to determine the extent to which the influx of Mexico-domiciled trucks will increase emissions in nonattainment areas, the emissions reduction from other sources that will be needed to offset the increased emissions from Mexico-domiciled trucks, and the steps necessary to achieve the offsets. Since the above-listed actions do not conform to the Texas and California implementation plans ("SIPS"), the FMCSA may not engage in or support those actions in any way. The FMCSA also cannot approve any actions by private entities (i.e., the owners and operators of the Mexico-domiciled trucks) that result in the increased emissions described above.

I. The FMCSA's Environmental Assessment Is Grossly Inadequate and Should Be Replaced With a Full-Fledged EIS Prior to Proceeding with the Above-Listed Actions.

Under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., when a federal agency proposed to undertake a "major federal action significantly affecting the quality of the human environment," it must prepare an EIS detailing its environmental impact, any unavoidable adverse environmental effects, alternatives to the action, local short-term uses versus long-term productivity, and the commitment of any irreversible and irretrievable resources. In 1978, the Council on Environmental Quality ("CEQ") promulgated regulations that federal agencies are required to follow in implementing NEPA. 40 C.F.R. §§ 1500 et seq. In determining whether to prepare in EIS, the agency must ordinarily prepare an environmental assessment (EA). 40 C.F.R. § 1501.4(b). If the EA leads the agency to conclude that an EIS is not necessary, it must prepare a finding of no significant impact (FONSI). 40 C.F.R. § 1501.4(e).

The FMCSA has prepared an EA and a FONSI for the actions that it proposed on May 3, 2001.[2] We assume that the agency intends the EA and FONSI to cover the interim final rules listed above. In any event, the EA and FONSI are legally defective in numerous respects.

For example, the CEQ regulations define the term "effects" to include "[d]irect effects which are caused by the action and occur at the same time and place" and

[2] John A. Volpe Transportation Systems Center, Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment (January 2000).

"indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). In particular, "indirect effects" may include growth inducing effects . . . and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). As the agency's EA apparently recognizes, the adverse air quality impacts of the increase in the number of Mexico-domiciled trucks that will come into existing ozone and particulate nonattainment areas and areas that are potentially nonattainment for ozone and fine particulates are clearly indirect effects of the above-listed actions. Yet the EA dismisses these effects, completely disregarding the technical evidence demonstrating that the increased emissions will be substantial.

The EA is also defective in terms of defining the areas that will be impacted. The CEQ regulations define the terms "significantly" to require considerations of both "context" and "intensity." In considering the "context" of the action, the agency must analyze "several contexts" including both "society as a whole" and the "affected region." 40 C.F.R. § 1508.27(a).

Incredibly, the EA prepared by the FMCSA examined only the overall percentage increases in emissions *nationwide* and entirely failed to assess the air quality impact of increased emissions and increased ambient pollutant levels in those areas where the impacts of the no action and proposed action scenarios are likely to be greatest. This approach directly conflicts with the agency's obligation to consider the "affected region." The Sierra Research Report demonstrates that many specific regions and geographic areas will be hard hit as a result of the interim final rules.

In considering the "context" of the action, the CEQ regulations provide that "[b]oth short and long-term effects are relevant." 40 C.F.R. § 1508.27(a). Yet as shown in the Sierra Research Report, the EA prepared by FMCSA considered only the exceedingly short-term impacts of the actions on air quality in the year 2002, *at least half of which will be over by the time that the trucks begin to move across the country.* The use of such a short time frame is preposterous in the context of regulatory decisions that will have such a long life span.

In considering the "intensity" or "severity" of the impact, the agency must examine "the degree to which the proposed action affects public health or safety," "[u]nique characteristics of the geographic area," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," and, importantly, "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b). Yet the consideration of these and other critical factors in the EA prepared for FMCSA was grossly inadequate.

More particularly, Sierra Research found that the EA contained the following specific flaws:

- Failing to account for emissions differences between Mexico-domiciled and U.S.-domiciled trucks that exist now and that will become even more significant in the future;
- Improperly assessing the air quality impact of the no action and proposed action scenarios by

comparing the associated increase in emissions to total nationwide emissions from trucks;

- Failing to assess the air quality impact of increased emissions and increased ambient pollutant levels in those areas where the impacts of the no action and proposed action scenarios are likely to be greatest, which include many areas that current do not comply with existing federal air quality requirements and are likely to be out of compliance with future federal requirements;
- Failing to assess the localized air quality impacts of increased numbers of safety inspections;
- Failing to consider increases in emissions of toxic air contaminants resulting from the no action or proposed action alternatives, particularly within the context of the increase in local emissions due to increased numbers of safety inspections; and
- Failing to assess the air quality impacts of the no action and proposed action alternatives over more than a single year or beyond 2002.

The Sierra Research Report found that both the "no action" and "proposed action" alternatives examined in the EA would foreseeably result in adverse air quality impacts in two ways. First, both alternatives would "allow the direct substitution of higher-emitting Mexico-domiciled-domiciled trucks for lower-emitting U.S.-domiciled trucks for freight carrying in the United States." Second, both alternatives would "have the potential to increase overall U.S. truck traffic." Sierra Research concluded that the actions would "present a

particularly significant issue in those areas of the southwestern U.S. that currently violate and are likely to continue to violate health-based federal National Ambient Air Quality Standards (NAAQS) applicable to ozone and fine PM."

Clearly, much more work is necessary before the above listed actions may legally go into effect. The key assumptions underlying the EA are completely flawed. Contrary to the EA, existing research concludes and knowledgeable experts state that the federal actions being proposed through these regulations will indeed significantly increase U.S. truck traffic beyond historical levels. *See, e.g.*, Comment Letter of Mark J. Spalding dated April 17, 2002. The same is true with respect to the potential displacement of U.S. domiciled-trucks by Mexico-domiciled trucks: existing research concludes and reputable sources state that a significant displacement is likely to occur. *See Id.*; "North America Trade and Transportation Corridors: Environmental Impacts and Mitigation Strategies, "prepared for the North American Commission for Environmental Cooperation by ICF Consulting (February 21, 2001) (copy enclosed).

The Sierra Research Report and simple common sense suggest that an action that will have the effect of allowing thousands of heavily polluting Mexico-domiciled trucks to travel through some of the most seriously polluted cities in the United States—cities that are struggling to bring air quality up to healthy levels—will significantly affect the quality of the human environment. The FMCSA must therefore prepare a full-fledged EIS detailing the adverse environmental effects on the most affected regions of the country.

II. The Above-Listed Actions Do Not Conform to the Approved SIPs for California and Texas and Therefore Cannot Be Implemented.

Section 176 of the Clean Air Act provides that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to" a State Implementation Plan (SIP) promulgated pursuant to section 110 of the Clean Air Act. 42 U.S.C. § 7506(c)(1). The statute further defines "conformity to an implementation plan" to mean conformity to the plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards. 42 U.S.C. § 7506(c)(1)(A). It is also defined to mean that "such activities will not—(i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." 42 U.S.C. § 7506(c)(1)(B).

EPA's implementing regulations require federal agencies to make a determination that an action conforms to the relevant SIPs based upon a written conformity analysis before taking the action if the action will cause direct or indirect emissions that exceed de minimis levels. 40 C.F.R. § 51.850(b), 51.(b), 51.854. The de minimis level of VOC and Nox emissions vary, depending upon the extent of nonattainment. For serious areas the de minimis level is 50 tons per year (tpy). For severe areas (including Houston, Northwest Los Angeles County, Ventura County, and San Diego)

it is 25 tpy, and for extreme areas (Los Angeles), it is 10 tpy. 40 C.F.R. § 51.853(b).

The Sierra Research Report graphically demonstrates the difference in emissions rates between U.S. trucks and Mexico-domiciled trucks and shows how those differences grow dramatically from 2010 to 2020 to the point at which Mexico-domiciled truck emissions will be almost 4.5 times U.S. truck emissions for both oxides of nitrogen (an ozone precursor) and particulate matter. The emissions will far exceed the de minimis thresholds set out in the EPA regulations. For example, Sierra Research has calculated that if we make the reasonable assumption that 50 percent of the U.S. trucks currently traveling through Houston are replaced by Mexico-domiciled trucks, the increase in Nox emissions by the critical attainment year of 2007 will be 84 tons per *day*, more than three times the de minimis level for *annual* Nox emissions in a serious nonattainment area.

These staggeringly high increases in Nox and particulate emissions must be accounted for the in the emissions budgets for Houston, Dallas/Ft Worth, San Diego, Los Angeles, San Francisco and intervening nonattainment areas, and federally enforceable offsetting emissions reductions must be located and implemented before the FMCSA and NHTSA actions may be allowed to go forward. At the very least, the agencies must prepare their own conformity analysis that assesses the impact over the years of their actions on the nonattainment areas through which the Mexico-domiciled trucks will travel.

III. Conclusion

The easily foreseeable result of implementing the above-described regulations is a large influx of trucks from Mexico that do not conform to the emissions standards with which U.S. trucks must by law comply. Just as foreseeable is a large increase in emissions of NOx, particulate matter, and other toxic air pollutants. Before FMCA may lawfully allow the above-listed regulations to go into effect, the agencies must prepare an EIS detailing the adverse environmental impacts of these increases in emissions. Furthermore, the FMCSA cannot lawfully allow the regulations to go into effect until it has prepared an adequate conformity analysis under section 176 of the Clean Air Act and ensured that the actions will not cause or contribute to any new violation of any standard in any area, increase the frequency or severity of any existing violation of any standard in any area, or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

We urgently request that FMCSA not allow the above-listed actions to go into effect until the agency has complied with its legal obligations under the National Environmental Policy Act and the Clean Air Act.

Respectfully Submitted,

/s/ STANLEY S. MALLISON

STANLEY S. MALLISON

REPORT NO. SR02-04-01

CRITICAL REVIEW OF "SAFETY OVERSIGHT FOR MEXICO-DOMICILED COMMERCIAL MOTOR CARRIERS, FINAL PROGRAMMATIC ENVIRONMENTAL ASSESSMENT," PREPARED BY JOHN A VOLPE TRANSPORTATION SYSTEMS CENTER, JANUARY 2002

April 16, 2002

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Critical Review of

"Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment," Prepared by John A Volpe Transportation Systems Center, January 2002

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EXECUTIVE SUMMARY

The Federal Motor Carrier Safety Administration (FMCSA) is proposing several actions that may dramatically increase the number of Mexican-domiciled heavy-duty Diesel vehicles operating in the United States and that would lift current restrictions that limit operation of such vehicles to the immediate border. Under the National Environmental Policy Act ("NEPA"; 42 U.S.C. 4371 *et seq.*, enacted in 1969), responsible federal officials must prepare, prior to undertaking "major Federal actions significantly affecting the quality of the human environment," a "detailed statement" (referred to as an Environmental Impact Statement, or EIS) addressing the following aspects of the proposed action: its environmental impact, any unavoidable adverse environmental effects, alternatives to the action, local short-term uses versus long-term productivity, and the commitment of any irreversible and irretrievable resources.

The threshold question in the NEPA process is whether the action is one that "significantly" affects the environment. In 1978, the Council on Environmental Quality (CEQ) adopted formal regulations (40 CFR 1500-1508) governing the NEPA process. The regulations contain a brief description of the process agencies must follow in determining the threshold question of significance. The key definitions are those for "effects" and "significantly." The definition of "effects" (40 CFR 1508.8) requires an examination of direct effects, and also indirect effects that are "reasonably foreseeable" as well as "cumulative." In addition to ecological impacts, the examination must consider "aesthetic, historic, cultural, economic, social and health impacts." The term "significantly" is defined (40 CFR 1508.27) in

terms of two main general parameters, "context" and "intensity," with the latter broken down into ten distinct categories. If the answer to the threshold question of significance is in the affirmative, then an EIS must be prepared; if not, then a Finding of No Significant Impact (FONSI) is permitted.

The CEQ regulations (40 CFR 1501.3, 1501.4 and 1508.9) specify that, unless the project falls into a predetermined category under the lead agency's internal NEPA procedures, the preliminary question of significance is to be addressed through the preparation of an "Environmental Assessment", or EA. The EA is a "concise public document" that must (1) "briefly provide sufficient evidence and analysis" for determining whether an EIS or a FONSI must be prepared, (2) aid the agency in complying with NEPA when no EIS is prepared, and (3) facilitate preparation of an EIR when one is necessary. The EA must also include "brief discussions" of the need for the proposed action, alternatives, environmental impacts of the proposal and the alternatives, and a listing of agencies and persons consulted.

In this case, the FMCSA has made a FONSI based on an EA.* This report presents a detailed critical review of that EA, demonstrating that the EA is both inadequate in terms of scope as well as fatally flawed in terms of the methodology used to assess the significance of the air quality impacts associated with the proposed actions. Because of the inadequacy of the EA, we conclude that the FONSI is incorrect with respect

* "Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment," Prepared by John A Volpe Transportation Systems Center, January 2002.

to air quality impacts and that, based on NEPA, a complete EIS must be prepared for the proposed action.

The specific flaws in the FMCSA EA include the following:

- Failing to assess the air quality impacts of the no action and proposed action alternatives over more than a single year or beyond 2002;
- Improperly assessing the air quality impacts of the no action and proposed action scenarios by comparing the associated increase in emissions to total nationwide emissions from trucks;
- Failing to account for emissions differences between Mexican-domiciled and U.S.-domiciled trucks that exist now and that will become even more significant in the future;
- Failing to assess the air quality impacts of increased emissions and increased ambient pollutant levels in those areas where the impacts of the no action and proposed action scenarios are likely to be greatest, which include many areas that currently do not comply with existing federal air quality requirements and are likely to be out of compliance with future federal requirements;
- Failing to consider increases in emissions of toxic air contaminants resulting from the no action or proposed action alternatives, particularly within the context of the increase in local emissions due to increased numbers of safety inspections; and
- Failing to assess the localized air quality impacts of increased numbers of safety inspections.

The overall impact of both the no action and proposed action alternatives will be to allow the substitution of higher-emitting Mexican-domiciled trucks for lower-emitting U.S.-domiciled trucks for freight-carrying in the United States. In addition, the alternatives have the potential to increase overall U.S. truck traffic. Based on the available data, this will present a particularly significant issue in those areas of the southwestern U.S. that currently violate and are likely to continue to violate current and future health-based federal National Ambient Air Quality Standards (NAAQS) applicable to ozone and fine PM.

Both the no action and proposed action alternatives are in direct conflict with federal law that requires compliance with the NAAQS by specific dates. Heavy-duty Diesel vehicles are widely recognized as contributing to high ambient levels of ozone and fine particulate matter and for that reason have been required to meet increasingly stringent and costly emission standards established by the U.S. EPA. Allowing higher-emitting Mexican-domiciled trucks that do not have to comply with the same emission standards as comparable U.S.-domiciled trucks will not only undercut the U.S. EPA standards but also promote the use of Mexican-domiciled trucks for hauling freight in the U.S.

In addition to the NEPA process, the U.S. EPA has promulgated conformity regulations (§51 and §93 of Title 40 Code of Federal Regulations) to assure that actions taken by the federal government are consistent with air quality goals in that they do not cause or contribute to any violation of a NAAQS in any area, or delay attainment with a NAAQS in any area. The FMSCA has not performed any conformity analyses for the current project despite the fact that the no action

and proposed action alternatives are very likely to lead to emission increases that exceed the threshold levels above which a conformity analysis would be required in many existing nonattainment areas.

BACKGROUND

Freight Transport and Truck Emissions

Most freight carried by trucks in the United States is transported by heavy-duty Diesel vehicles. In turn, most of the freight carried by heavy-duty Diesel vehicles is transported by trucks with gross vehicle weight ratings of more than 60,000 pounds,* which are referred to as Class 8b trucks in most air quality arenas. The pollutants emitted by these vehicles that are of greatest concern from an air quality perspective are oxides of nitrogen (NOx) and particulate matter (PM). Emissions of volatile organic compounds (VOC) from heavy-duty Diesel vehicles are also of some concern although emission levels are generally much lower than applicable emission standards.

It is expected that both the no action and proposed action scenarios considered by FMCSA will result in an immediate increase in the use of Mexican-domiciled Class 8b trucks in the United States outside of the existing border areas as indicated in the EA. In addition, the use of Mexican-domiciled trucks in the United States outside of border areas is expected to increase in the future.** It is also expected that the no action and proposed action scenarios will result in Mexican-domiciled vehicles being used to carry freight that is cur-

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* "Comprehensive Truck Size and Weight Study," U.S. Dept. of Transportation, August 2000.

** "NAFTA, Coordinated Operational Plan Needed to Ensure Mexican Trucks Compliance with U.S. Standards," U.S. GAO, December 2001.

rently being carried by U.S.-domiciled trucks and that it is possible that they may actually increase total truck traffic in the U.S. by reducing the costs associated with shipping freight by truck.***

If the emission levels of Mexican-domiciled trucks were equal to those of U.S.-domiciled vehicles in the past, present, and future, the only potential air quality impact associated with the no action and proposed action scenarios would be an increase in total truck traffic in the U.S. However, in general, emission levels of Mexican-domiciled trucks have not been, are not now, and will not be the same as those of U.S.-domiciled trucks for at least two reasons. First, as discussed in more detail later, the emission standards that have applied and will apply to Mexican-domiciled trucks are, in general, higher than those for comparable U.S.-domiciled trucks. Based on the best current information, it appears that there will be a large difference in NOx, PM, and VOC emission levels between new U.S. trucks and new Mexican trucks beginning in 2007 when stringent new U.S. emission standards and a U.S. nationwide requirement for production of ultra-low sulfur Diesel fuel begin to be phased in. Secondly, Mexican-domiciled trucks tend, on average, to be older than those domiciled in the U.S. This, coupled with the fact that older trucks have higher emissions than newer vehicles, again leads to a situation where even if all other things were equal, Mexican-domiciled trucks would have higher emissions than comparable U.S.-domiciled trucks.

*** "North American Trade and Transportation Corridors: Environmental Impacts and Mitigation Strategies," ICF Consulting, August 2001.

Based on the above, there are two air quality issues of concern with respect to the proposed action:

1. Higher emissions in the United States resulting from the operation of Mexican-domiciled trucks as replacements for U.S.-domiciled trucks, and
2. Higher emissions in the United States resulting from an increase in freight demand due to the lower costs associated with freight shipping with Mexican-domiciled trucks.

Although not properly addressed in the FMCSA EA, these issues are of concern both now as well as into the foreseeable future.

Relevant Air Quality Issues In the United States

In the United States, the federal government has established National Ambient Air Quality Standards (NAAQS) for a number of pollutants in order to protect public health. The NAAQS set exposure limits that are generally cast in terms of limits on the maximum concentration of pollutants that the public can be exposed to during some period of time. Compliance with the NAAQS is determined for relatively small geographical areas (rather than the United States as a whole) based on air quality monitoring data. Areas in which pollutant concentrations exceed those allowed are described as being in "nonattainment" with respect to the NAAQS.

With respect to the matter at hand—the EA for the proposed FMCSA action—potential adverse impacts on the ability of areas to achieve and maintain compliance with NAAQS for ambient ozone and fine particulate

matter (PM)* represent significant air quality issues. Ozone is formed by a complex series of reactions between HC and NOx in the presence of sunlight. It is a strong irritant to the lungs and eyes and at high concentrations causes shortness of breath and also aggravates asthma, emphysema, and other conditions. Fine PM can penetrate deep into the lungs where it becomes deposited, which causes and aggravates respiratory problems, decreases in lung function, and premature death. It should also be noted that there are two types of fine PM: (1) particles that are directly emitted from sources such as the exhaust of Diesel engines, and (2) so-called "secondary" particles that form in the atmosphere due to gas to particle conversion. NOx can be an important chemical species with respect to secondary particle formation.

It should also be noted that, although delayed by litigation, it appears that new NAAQS for both ozone and fine PM (in this case $PM_{2.5}$) will be enforced by the U.S. EPA. These new NAAQS are considered to be more stringent than the existing NAAQS for ozone and fine PM (PM_{10}). There are different degrees of "nonattainment" with the NAAQS that have been established. For the current one-hour ozone NAAQS, in order of increasing nonattainment, these are marginal, moderate, serious, severe, and extreme. For the current one-hour PM_{10} NAAQS, the categories are moderate and serious.

States in which nonattainment areas are located are required pursuant to federal law to develop plans that

* Particulate matter is generally characterized in terms of particle diameter, with PM_{10} referring to particulate matter with diameters of 10 microns or less and $PM_{2.5}$ referring to particulate matter with diameters of 2.5 microns or less.

specify the actions that will be taken to reduce pollutant levels to the degree required to comply with the NAAQS prior to deadlines specified by federal law. Once compliance with the NAAQS is achieved, additional plans are required under federal law that specify the actions that will be taken to control emissions so that compliance with the NAAQS will be maintained in the future. Failure to come into compliance with NAAQS by the required deadlines and to maintain compliance can lead to the imposition of economic sanctions by the federal government and, in some cases, intervention by the federal government that involves the development and enforcement of a plan to bring the area into compliance.

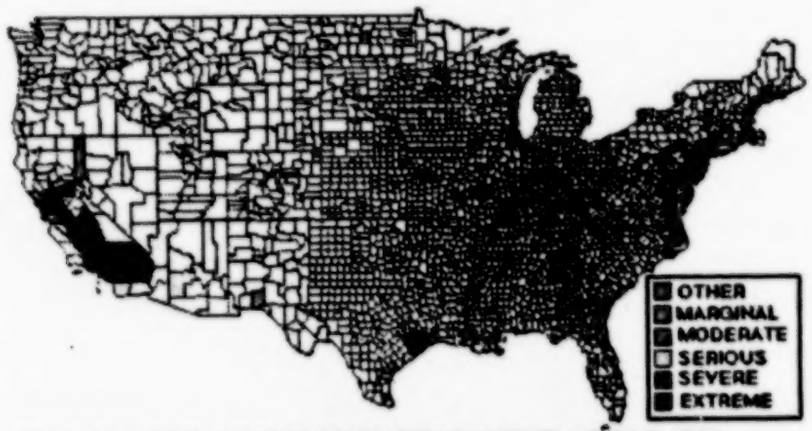
In addition to the legal requirements regarding the attainment of the NAAQS in given areas, there are legal requirements that compel federal government agencies to assess the impact of their actions on emissions levels in areas where there are currently or have been violations of the NAAQS. These requirements are referred to as "conformity" and the applicable provisions with respect to the no action and proposed action scenarios are found in §51 and 93 of Title 40, Code of Federal Regulations. As set forth in those sections, a conformity analysis may be required if the emission increases associated with an action equal or exceed the values shown in Table 1.

Currently, there are a number of areas of the country that are in nonattainment for either or both the ozone and PM_{10} NAAQS. These areas are shown in Figures 1 and 2 for ozone and PM_{10}, respectfully. All areas of the U.S. are required to come into attainment with the current ozone standard by 2010 and no later than 2007 (considering possible extensions) for PM_{10}.

Table 1
Selected Emission Increases Associated with Federal Actions That Trigger Conformity Requirements
(levels not to be equaled or exceeded)

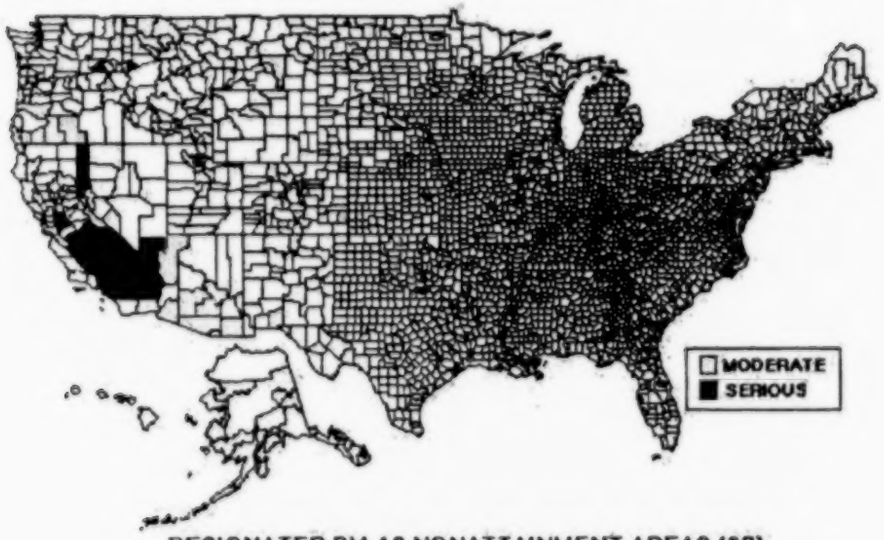
NAAQS/Area Designation	Pollutant	Emission Increase (tons per year/(tons per day))
Ozone/Extreme	VOC or NOx	10/(0.03)
Ozone/Severe	VOC or NOx	25/(0.07)
Ozone/Serious	VOC or NOx	50/(0.14)
Ozone/Other with Transport	VOC	50/(0.14)
Ozone/Other with Transport	NOx	100/(0.27)
Ozone/Other without Transport	VOC or NOx	100/(0.27)
Ozone/Maintenance	NOx	100/(0.27)
Ozone/Maint. with Transport	VOC	50/(0.14)
Ozone/Maint. without Transport	VOC	100/(0.27)
PM_{10}/Serious	PM_{10}	70/(0.19)
PM_{10}/Moderate	PM_{10}	100/(0.27)
PM_{10}/Maintenance	PM_{10}	100/(0.27)

Figure 1
Identification of Nonattainment Areas for the 1-Hour Ozone Standard



As shown in Figure 1, many urban areas in the Southwestern U.S.—including the San Diego, Los Angeles, and Central Valley areas of California, Phoenix, Arizona; and Houston, Dallas, and El Paso, Texas—are currently in nonattainment with the existing ozone NAAQS. Similarly, Figure 2 shows that many of these areas and others are also in nonattainment with the current PM_{10} NAAQS.

Figure 2
Current Nonattainment Areas for PM_{10} Standard



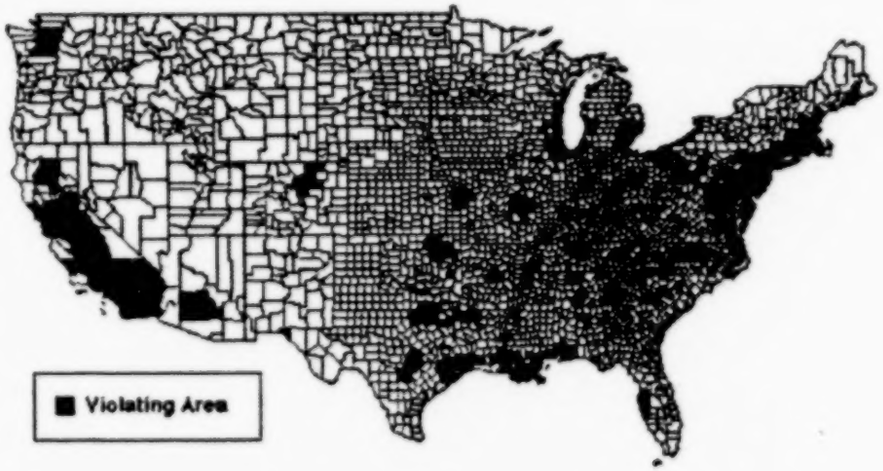
DESIGNATED PM-10 NONATTAINMENT AREAS (68)
UNDER CLEAN AIR ACT AMENDMENTS OF 1990
AS OF JANUARY 15, 2002

Source: Based upon U.S. EPA data interpreted by A.S.L. & Associates, Helena, MT
1/2002

Source: A.S.L. & Associates, Helena, Montana USA

Similar figures showing likely nonattainment areas for the new federal ozone and $PM_{2.5}$ NAAQS are shown in Figures 3 and 4, respectively. As shown in Figures 3 and 4, these and more areas are projected to be in nonattainment with the new ozone and $PM_{2.5}$ NAAQS when the U.S. EPA make formal determinations. Compliance deadlines with the new standards have not yet been set, although they are sure to extend beyond the deadlines for the current NAAQS.

Figure 3
Identification of Counties that May Violate the 8-Hour Ozone Standard
(Based on 1998-2000 Data*)



PROJECTED VIOLATION AREAS FOR THE 8-HOUR OZONE STANDARD
(1998-2000)

Source: Based upon U.S. EPA data interpreted by A.S.L. & Associates, Helena, MT
7/2001

Figure 5 depicts the expected U.S. freight corridors for U.S./Mexico truck traffic resulting from NAFTA as projected by the U.S. Federal Highway Administration for 2020. As seen by comparing this figure with the nonattainment area maps in Figures 1-4, major freight routes, where the amount of freight carried by Mexican-domiciled trucks may increase substantially, pass directly through many of the areas that are and will be in nonattainment of the ozone and fine PM NAAQS. Similar data for 1996 also show the same major freight routes for U.S./Mexico truck traffic.*

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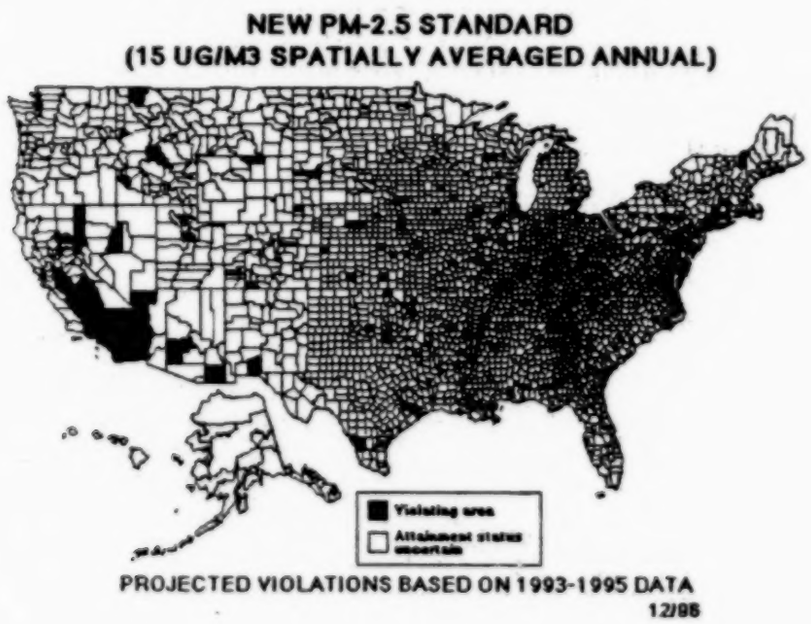
*McCray, J.P., and Harrison, R., "NAFTA Trucks on U.S. Highway Corridors", Presented at the 78th Annual Meeting of the Transportation Research Board, Washington, D.C., January 14, 1999.

In addition to the NAAQS, the U.S. EPA also states in the preamble to the 2007 standards that it believes that Diesel exhaust "is likely to be carcinogenic in humans by inhalation" and notes that reductions in fine PM emissions along with emissions of the Toxic Air Contaminants (TACs) benzene, 1,3-butadiene, formaldehyde, and acetaldehyde resulting from the 2007 standards will reduce public exposure to this hazard.

Figure 4
Possible Nonattainment Areas for Spatially Averaged $PM_{2.5}$ 15 ug/m3 Annual Standard 1993-1995



As Mexican-domiciled trucks will not be subject to the same standards as U.S.-domiciled trucks, absent changes in Mexican requirements, they will present a great toxics risk.

Finally, it should be noted that the state of California has established its own ambient air quality standards, which are in general more stringent than the federal NAAQS. The California Air Resources Board (CARB) is charged with reducing emissions sufficiently to attain both the federal and state standards. This is a difficult challenge as evidenced by CARB's recent release of a comprehensive Clean Air Plan* that indicates that the agency will be required to adopt increasingly costly emission reduction measures in order to achieve its goals. Increase in emissions associated with the operating of Mexican-domiciled trucks in California will hinder the state's ability to achieve those goals and require the adoption of even more costly measures than would otherwise be necessary.

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* California Air Resources Board, Proposed "Clean Air Plan: Strategies for a Healthy Future, 2002 to 2020," March 15, 2002.

Figure 5
NAFTA—US/Mexico Truck Traffic on US Highway Network in 2020

Source: Federal Highway Administration, Office of Freight Management and Operations

Implications

As outline above, many areas in the Southwestern and Southern United States currently violate and are likely to continue to violate health-based federal NAAQS applicable to ozone and fine PM. Federal law requires those areas to develop plans for reducing emissions to lower ambient concentrations of these pollutants and to

come into compliance with the NAAQS by specific dates. Heavy-duty Diesel vehicles are widely recognized as contributing to high ambient levels of ozone and fine particulate matter and for that reason have been required to meet increasingly stringent emission standards established by the U.S. EPA. In addition, in light of this fact, the U.S. EPA recently adopted dramatically more stringent emission standards for Diesel vehicles and specifications for Diesel fuel to enable compliance with those standards, specifically to aid area such as these in their quest to comply with the NAAQS.*

Now, in almost diametric opinion to the above, the federal government is proposing an action that may result in the operation of large numbers of higher-emitting Mexican-domiciled Diesel trucks operating in nonattainment areas. This clearly undercuts the recent U.S. EPA rulemaking and will make compliance with the NAAQS more difficult than it would otherwise be (or perhaps impossible) for those areas. Further, the FMCSA EA upon which the FONSI with respect to air quality is based either ignores or improperly addresses these issues.

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* Federal Register, Vol. 66, No. 12,5002-5193, January 18, 2001.

CRITICAL REVIEW OF FMCSA EA

Summary of FMCSA EA

The air quality related portion of the FMCSA EA is found on pages 3-9 through 3-12 of Section 3 entitled "Affected Environment" and on pages 4-14 through 4-24 of Section 4 entitled "Environmental Consequences," with additional details presented in Appendix C.

In Section 3, the EA recognizes the NAAQS and the air quality planning process for nonattainment areas (including the related transportation planning requirements), and notes that some of the counties directly on the Mexican border and in the location of the busiest border crossings are in nonattainment with either the current ozone or PM NAAQS or both.

The EA also notes correctly both that mobile sources make a significant contribution to total emissions of VOC, NOx, and PM emissions and that heavy-duty Diesel vehicles are of concern from an air quality perspective primarily because they emit substantial amounts of NOx and PM.

In Section 4, the potential impacts of the proposed action on air quality are addressed. The basic methodology employed in the EA compares emissions from Mexican-domiciled vehicles operating in the U.S. in 2002 under each scenario to total U.S. emissions from *all on-road vehicles in the U.S.* and then to *total emissions from all sources in the U.S.* based on data developed by the U.S. EPA for 1999. Emissions of Mexican-domiciled vehicles were assumed to be equal to those of U.S.-domiciled vehicles. The numbers of Mexican-domiciled vehicles assumed to be operating in the U.S. under each scenario during 2002 were estimated by

FMCSA. These estimates indicate that on the order of 30,000 Mexican-domiciled trucks will begin to operate inside the U.S. beyond the current border areas in 2002 alone.

Emissions associated with proposed safety inspections of Mexican-domiciled vehicles are estimated separately for 2002 using the U.S. EPA MOBILE5b and PART5 emission factor models and are also compared to total U.S. emissions in 1999. Again, estimates of the numbers of vehicles tested and the characteristics of those inspections were developed by FMCSA and are not documented in the EA. In addition, emissions from Mexican trucks were apparently assumed to be the same as comparable U.S. trucks although it appears that the older age of Mexican-domiciled vehicles was taken into account to some degree in this limited section of the EA air quality impacts analysis.

Flawed Air Quality Analysis Methodology

The air quality analysis methodology used in the EA is fatally flawed due to a number of serious methodological deficiencies and the use of a number of erroneous assumptions. As a result, the methodology used in the EA is completely inappropriate for assessing the air quality impacts of the no action and proposed action scenarios. Because the air quality analysis is fatally flawed, the FONSI with respect to air quality is inappropriate because it is not supported.

The fundamental flaws with the air quality analysis contained in the EA include the following:

1. Failure to consider impacts in the proper geographical regions;
2. Failure to consider impacts over the proper time horizon;
3. Failure to account for differences in emissions between Mexican- and U.S.-domiciled trucks;
4. Failure to consider impacts of emissions of toxic air contaminants (TACs); and
5. Failure to properly assess the impacts on air quality.

The nature and import of these flaws are outlined below and should be addressed through an EIS. In addition, an assessment of the potential emission impacts of the no action and proposed action alternatives indicates that those impacts generally exceed the thresholds beyond which transportation conformity analysis requirements are triggered for affected nonattainment and maintenance areas.

Inappropriate Analysis Areas

The FMCSA EA evaluates the emission impacts of the no action and proposed action scenarios in light of annual nationwide emissions from on-road trucks. This approach is invalid and the results are meaningless with respect to the assessment of the significance of air quality impacts.

Air quality issues, including ozone and fine PM concentrations, are usually evaluated for relatively small geographical areas. For example, attainment and nonattainment designations with respect to the various

NAAQS may be areas that represent only a portion of a single county. The reason for this is that local air quality particularly is determined primarily by local emissions and local meteorological conditions.

As shown previously in Figure 5 and the maps in Figures 1–4, the impacts of the no action and proposed action alternatives are likely to occur along major trucking corridors that pass through areas that are not in attainment with the current and future ozone and fine PM NAAQS. It is in these areas where the assessment of impacts needs to be performed. Obviously, even if an increase in emissions that represents only a small fraction of nationwide emissions occurs in an localized area with pre-existing air quality problems —such as San Diego, El Paso, Houston, or Dallas—that increase could either prevent or substantially delay attainment with the NAAQS.

The magnitude of the potential impacts of Mexican-domiciled trucks must be investigated in each of the major urban areas in the Southwest that are currently in nonattainment with ozone and PM NAAQS as well as those likely to be in nonattainment with the new ozone and fine PM standards and those where maintenance plans are in effect. In addition, analyses may need to be performed for other nonattainment areas that are much further from the border, including Baton Rouge, St. Louis, and potentially the major urban areas of the eastern seaboard. Again, it should also be noted that the purpose of U.S. EPA conformity requirements that apply in localized areas is to ensure that federal actions such as this do not result in the exceedance of delayed compliance with applicable NAAQS.

Inappropriate Analysis Period

The EA analyzes the impact of the no action and proposed action alternatives for only a single year—2002. No explanation is provided for why this is appropriate or how an analysis performed for only a single year is satisfactory to assess the impacts of the alternatives that will extend into the future and will change over time. As noted previously, the areas that may be adversely affected by the alternatives must come into compliance with current federal air quality standards late in this decade and with future standards probably sometime during the next decade. Therefore, the analysis should be carried out over a much longer period, in our opinion through at least 2020.

As shown above, Mexican-domiciled trucks will have higher emissions than U.S.-domiciled trucks, with the differences in emissions increasing over time. This fact must be taken into account in the EA. Further, it is clear from Section 3 of the EA that Mexican imports and northbound border crossings of trucks from Mexico are increasing over time. Further, the FHWA data shown in Figure 5 incorporate an estimated 3.4% annual increase in freight traffic into and out of Mexico from the U.S. in developing the estimates for 2020. This means that even without a shift in freight from U.S.- to Mexican-domiciled trucks, there will be greater numbers of the latter operating in the U.S. in the future.

It is also likely that there will be a shift in freight from U.S.- to Mexican-domiciled trucks that will further in

crease their operation in the U.S. over time. There are several reasons for this, including the following:

1. New Mexican trucks will likely be less expensive to purchase and operate than comparable new U.S. trucks because they will not be required to certify to the same stringent emission standards (which require the use of expensive aftertreatment devices) and will not suffer the associated fuel economy penalties; and

2. The ability of U.S. trucks designed to comply with the 2007 U.S. EPA standards and to operate on ultra-low sulfur Diesel fuel will likely be limited (because of the required after treatment devices) if that fuel is not available in Mexico, as engine manufacturers probably will not honor warranties for vehicles that have been misfueled with higher sulfur Diesel fuels.

Therefore, any assessment of the actual operation of Mexican-domiciled trucks operating in the U.S. needs to consider both the short- and long-term impacts since there are likely to be significant changes in the amount of freight traffic handled by Mexican trucks operating in the U.S. over time. Again, the existing EA completely ignores this significant issue.

Differences In Emission Rates of Mexican- and U.S.-Domiciled Class8b Trucks

The EA assumes that the amount of emissions that results from the per-mile operation of Mexican- and U.S.-domiciled trucks is the same. This assumption is incorrect for two reasons. First, for a given model year, the U.S. truck will have been required, in general, to meet more stringent emissions standards. Second,

based on available data, the average Mexican truck is older than the average U.S. truck and, again in general, will have higher emissions regardless of its state of repair because older trucks are certified to less stringent emission standards.

Dealing first with the issue of different emission rates and standards, Table 2 shows how, on the basis of emissions, Mexican-domiciled trucks translate to U.S.-domiciled trucks as a function of model year. The development of this table and the sources of information are described in detail in Appendix A, along with all required assumptions.

The data in Table 2 were then used in combination with the latest versions of the U.S. EPA (MOBILE6 and PART5) and California Air Resources Board (EMFAC 2001) emission models.* assuming that the vehicles operated in the Houston or San Diego areas, respectively, to generate gram per mile traveled emission rates for the average Mexican-

* The MOBILE/PART and EMFAC emissions models have been developed by the U.S. EPA and CARB explicitly for estimating current and future year emissions from on-road vehicles and are required to be used in the preparation of air quality plans for California areas (EMFAC) and other areas of the country (MOBILE/PART). They are also used to evaluate the impact of proposed emission control measures.

Table 2
Emissions Equivalency Between Mexican- and U.S.-Domiciled Heavy-Duty Diesel Vehicles as a Function of Model Year

Mexican Truck Model Year(s)	Equivalent U.S. Truck Model Year(s) for Emissions
1966-1969	1966
1970-1972	1968
1973-1974	1971
1975-196	1973
1977-1978	1975
1979-1980	1977
1981-1982	1979
1983	1980
1984-1985	1981
1986	1982
1987-1988	1983
1989-1990	1986
1991	1988
1992	1989
1993-2003	1993-2003
2004+	2003

and U.S.-domiciled class8b heavy-duty Diesel trucks. Rates were calculated for 2000, 2002, 2007, 2010, 2015, and 2020. As shown in Tables 3 and 4, the composite emission rates for U.S.-domiciled trucks are lower in all years using both models.

The data presented in Tables 3 and 4 do not consider differences in the average age of Mexican- domiciled trucks versus U.S.-domiciled trucks. Data regarding the differences in the ages of the two fleets were developed for use in estimating emissions of Mexican

trucks from a "Mexicanized" version of the U.S. EPA MOBILE5 model prepared by Radian International under contract to the Western Governor's Association.*

Those data were used in combination with the data and models used to develop the information presented in Tables 3 and 4 to estimate the combined impact of different emission standards and older average ages on the relative per-mile emissions of Mexican-

* "Mexico Emissions Inventory Program Manuals, Volume VI, Motive Vehicle Inventory Development," Radian International, May 17, 1996.

Table 3
Comparison of Per-Mile Emission Rates of Mexican- and U.S.-Domiciled Class8b Heavy-Duty Diesel Vehicles Accounting for Different Emission Standards Using MOBILE6/PART5

Year	Emission Rates (grams per mile of operation)							
	NOx		$PM_{2.5}$		PM_{10}		VOC	
	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.
2000	25.70	25.45	0.66	0.56	0.73	0.62	1.29	1.05
2002	22.96	21.65	0.54	0.47	0.59	0.51	1.07	0.90
2007	16.69	13.00	0.34	0.31	0.38	0.34	0.72	0.60
2010	14.95	9.39	0.29	0.19	0.31	0.21	0.67	0.49
2015	13.46	4.45	0.23	0.08	0.25	0.09	0.61	0.37
2020	12.80	2.18	0.21	0.05	0.23	0.05	0.60	0.33

Table 4
Comparison of Per-Mile Emission Rates of Mexican- and U.S.-Domiciled Class8b Heavy-Duty Diesel Vehicles Accounting for Different Emission Standards Using EMFAC2001 for San Diego

Year	Emission Rates (grams per mile of operation)							
	NOx		$PM_{2.5}$		PM_{10}		VOC	
	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.
2000	21.53	19.13	0.58	0.45	0.63	0.48	1.34	0.96
2002	19.91	18.06	0.49	0.38	0.53	0.41	1.17	0.87
2007	16.60	12.83	0.29	0.23	0.32	0.26	0.81	0.63
2010	15.05	9.31	0.22	0.15	0.24	0.16	0.66	0.48
2015	13.89	5.23	0.18	0.08	0.19	0.09	0.56	0.32
2020	13.48	3.32	0.17	0.04	0.18	0.05	0.55	0.25

and U.S.-domiciled class8b trucks. The results are shown in Tables 5 and 6. As shown, the difference in average emission rates between the two fleets of vehicles becomes larger when both the effect of differences in emission rates and standards as well as the average age of the fleet are taken into account.

Additional details regarding the development of data presented in Tables 3-6 can be found in Appendix A.

Table 5
Comparison of Per-Mile Emission Rates of Mexican- and U.S.-Domiciled Class8b Heavy-Duty Diesel Vehicles Accounting for Both Different Emission Standards and Differences in Average Vehicle Age Using MOBILE6/PART5

Year	Emission Rates (grams per mile of operation)							
	NOx		$PM_{2.5}$		PM_{10}		VOC	
	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.
2000	31.54	25.45	1.49	0.56	1.63	0.62	3.33	1.05
2002	29.23	21.64	1.35	0.47	1.48	0.51	2.67	0.90
2007	24.62	13.00	0.82	0.31	0.90	0.34	1.34	0.60
2010	22.47	9.39	0.58	0.19	0.64	0.21	1.04	0.49
2015	18.03	4.45	0.29	0.08	0.32	0.09	0.71	0.37
2020	14.68	2.18	0.21	0.05	0.23	0.05	0.68	0.33

Table 6
Comparison of Per-Mile Emission Rates of Mexican- and U.S.-Domiciled Class8b Heavy-Duty Diesel Vehicles Accounting for Both Different Emission Standards and Differences in Average Vehicle Age Using EMFAC2001

Year	Emission Rates (grams per mile of operation)							
	NOx		$PM_{2.5}$		PM_{10}		VOC	
	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.	Mexican	U.S.
2000	24.86	19.13	0.84	0.45	0.92	0.48	2.01	0.96
2002	23.16	18.06	0.72	0.38	0.78	0.41	1.77	0.87
2007	20.42	12.83	0.46	0.23	0.50	0.26	1.34	0.63
2010	18.30	9.31	0.33	0.15	0.36	0.16	1.08	0.48
2015	16.11	5.23	0.22	0.08	0.24	0.09	0.90	0.32
2020	14.43	3.32	0.18	0.04	0.20	0.05	0.78	0.25

Focusing on NOx and PM emissions, the impact of the operation of Mexican-domiciled trucks in the U.S. can be seen in Figures 6 and 7 in terms of the ratio of their emissions on a per-mile basis to those of U.S.-domiciled trucks. Figure 6 shows the ratio of Mexican-

Figure 6

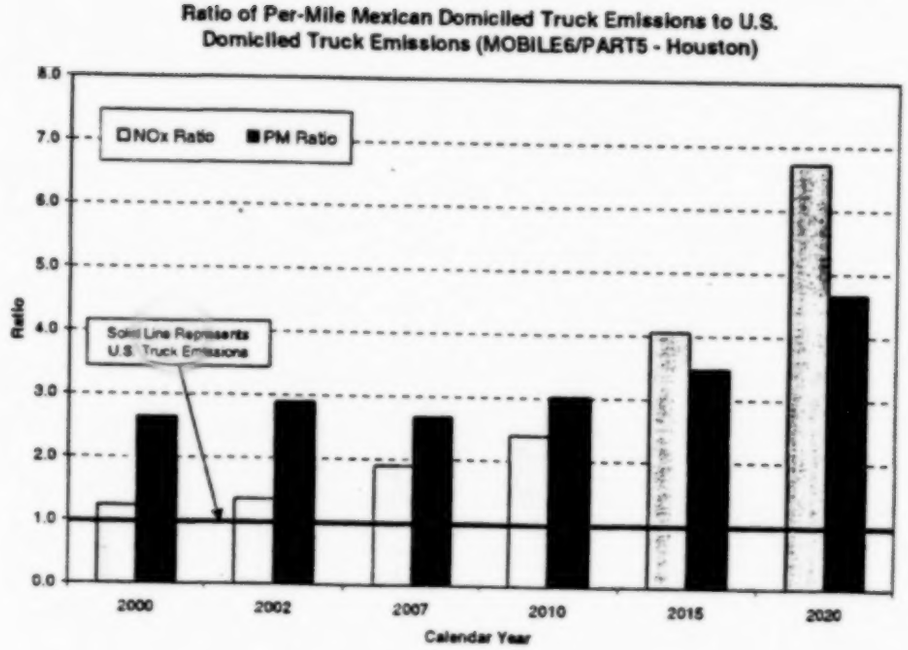
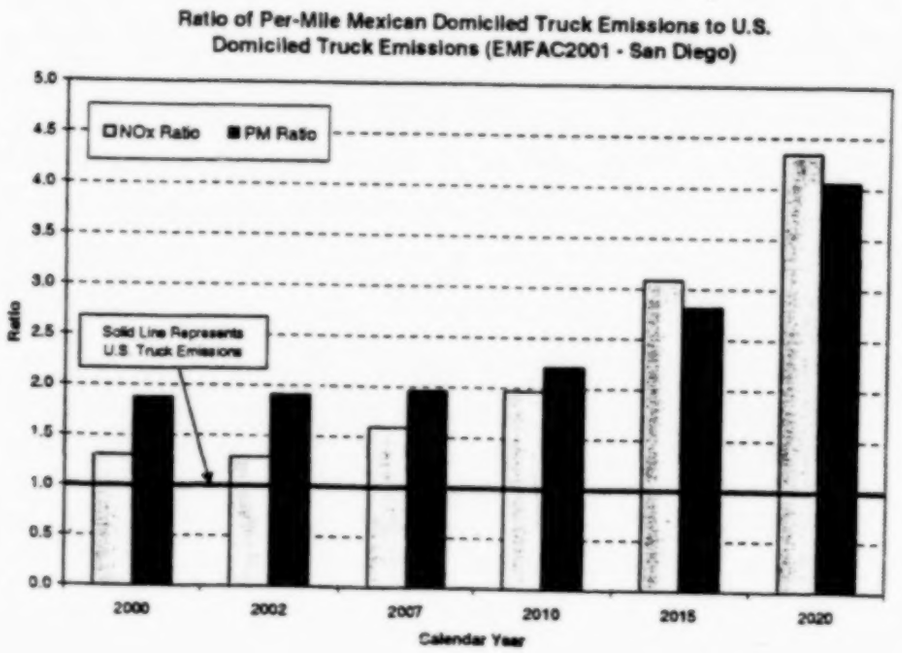


Figure 9Figure 7



domiciled truck emissions to U.S. truck emissions for NOx and PM for the fleets in operation from calendar year 2000 to 2020 as estimated using the U.S. EPA MOBILE6/PART5 models and the data described above. In the figure, a ratio of one means that Mexican-domiciled truck emissions are exactly equal to those of U.S.-domiciled trucks while ratios greater than one indicate higher emissions from the Mexican trucks. As shown in Figure 6, Mexican-domiciled trucks will have higher NO_x and PM emissions than U.S. trucks over the entire 20-year period examined. In 2007, the year that Houston is required to attain the ozone NAAQS, emissions of NO_x and PM for each mile of travel by Mexican trucks will be equivalent to 1.9 and 2.7 miles, respectively, of travel by U.S. trucks. Further, this emissions differential will grow dramatically from 2010 to 2020. Figure 7 shows that similar results are obtained when the issue is examined using California's EMFAC2001 emission model and data for the San Diego area.

Failure to Consider Toxic Air Contaminant Impacts

Emissions of TAC from heavy-duty Diesel vehicles are also a major concern. TACs that are emitted by Diesel vehicles include directly emitted Diesel PM, benzene, 1,3-butadiene, formaldehyde, and acetaldehyde. These latter four compounds represent a subset of VOC emissions. The magnitude of the concern posed currently by Diesel vehicles is illustrated in a recent study performed by the South Coast Air Quality Management District.* In that study, it was reported that Diesel PM emissions accounted for about 71% of the total risk associated with exposure to all TACs in southern California, with the other four TACs (which are also emitted by gasoline vehicles) accounting for the bulk of the remaining risk.

* Multiple Air Toxic Exposure Study (MATES-II), South Coast Air Quality Management District, March 2000.

As shown above, Mexican-domiciled trucks will have substantially higher PM emissions than U.S.-domiciled trucks and that difference in emissions will increase over time. As indicated by the data in Tables 5 and 6, the ratio of Mexican-domiciled truck VOC emissions to U.S.-domiciled truck VOC emissions ranges from about 1.5 to 2.5, meaning that the Mexican trucks emit approximately that much more of these TACs than do U.S. trucks.

The FMCSA EA fails to address the issue of increased emissions of TACs due to the no action or proposed action scenarios in any way. Emissions of TACs will clearly increase as a result. Given this, the impacts of the no action and proposed action alternatives on TAC emissions and ambient TAC levels need to addressed. This again is another area where the no action and proposed action alternatives run directly counter to the recent EPA rulemaking setting stringent standards for heavy-duty Diesel vehicles, which were intended in part to reduce public exposure to TACs.

Failure to Properly Assess the Impacts on Air Quality in Specific Areas and to Perform Transportation Conformity Analyses

As noted above, the air quality impacts associated with the no action and proposed action alternatives must be considered in those nonattainment areas where they will actually occur. In addition, the potential emission increases associated with the alternatives need to be compared to the conformity thresholds in Table 1; if

those thresholds are exceeded, a conformity analyses may be required.

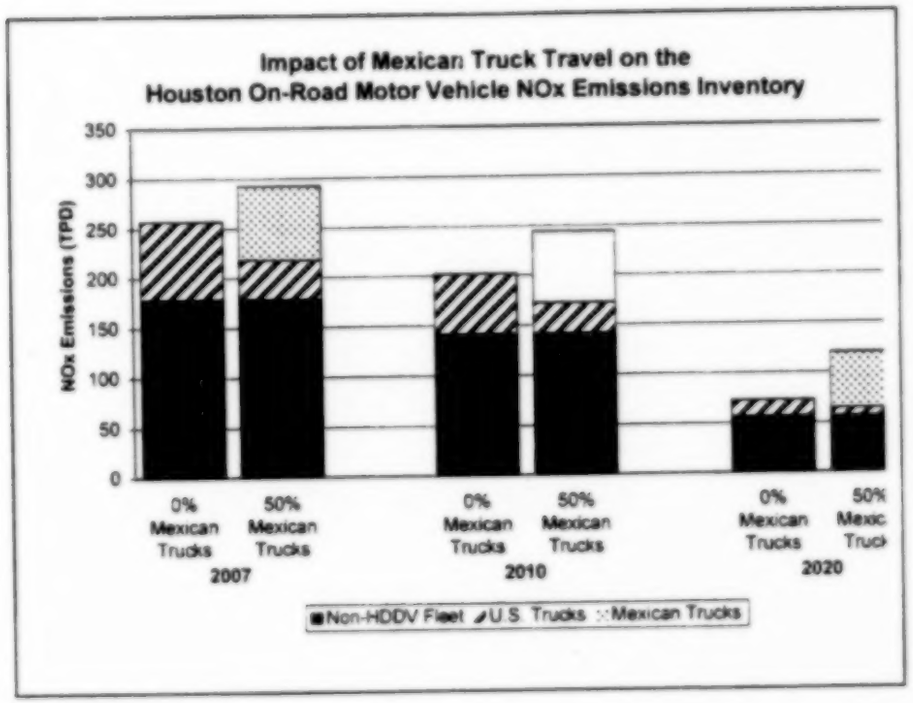
As an example of the impacts that Mexican-domiciled trucks could have in the near term, we evaluated the effects associated with a 50% replacement of U.S. trucks by Mexican trucks on NOx and PM_{10} emissions occurring in three ozone nonattainment areas. This value has been used in previous analyses of the impacts of lifting the current restrictions on Mexican-domiciled truck operation in the U.S* as a reasonable estimate of the amount of U.S. domiciled-truck activity that could be replaced in the long term by Mexican-domiciled trucks in urban areas near the Mexican-U.S. Border. (That there could be significant NAFTA-related truck travel through these urban areas is, again, demonstrated by Figure 5.) It should also be noted that in this analysis the impacts of Mexican-domiciled trucks on NOx and PM_{10} emissions are linearly proportional to the assumed percentage displacement of U.S.-domiciled truck activity. Additional details regarding this analysis are presented below and contained in Appendix A.

The first area analyzed was Houston, Texas, which is a severe ozone nonattainment area and is in compliance with the NAAQS for PM_{10}. NOx and PM_{10} impacts were evaluated for 2007 (the year that Houston must come into compliance with the ozone NAAQS), 2010, and 2020 using MOBILE6/PART5 relative to total emissions of these pollutants from the on-road vehicle fleet. As shown in Figure 8, using the assumptions stated above, the operation of Mexican-domiciled trucks in the Houston area would increase NOx emissions by about 35 tons per day in 2007, 42 tons per day in 2010, and 48 tons per day by 2020 relative to a baseline where only U.S.-domiciled trucks were in operation in the area. In addition, NO_x emissions from Mexican-domiciled trucks would account for an ever-increasing fraction of the total on-road NO_x inventory in the area and account for about 40% of the inventory by 2020.

* "North American Trade and Transportation Corridors: Environmental Impacts and Mitigation Strategies," ICF Consulting, August 2001.

The NO_x increases shown in Figure 8 should be compared to the 0.07 ton per day conformity threshold value for NO_x emissions in severe ozone nonattianment areas presented in Table 1. For the scenario analyzed, this threshold is exceeded by 500 times (35 tons per day/0.07 tons per day). To put these numbers in a slightly different perspective, in order to fall under the conformity threshold, Mexican-domiciled trucks would have to account for no more than 0.1% of heavy-duty truck operation in the Houston area in 2007 (50% of truck operation divided by a 500 times reduction in NO_x emissions required to fall below the threshold in 2007) and smaller fractions in later years.

Figure 8



A similar comparison for PM_{10} emissions is presented in Figure 9. As shown, direct PM_{10} emissions from on-road mobile sources in the Houston area will be increased by 1.7 tons per day in 2007 by the operation of Mexican-domiciled trucks based on the stated assumptions, with that value declining to about 0.7 tons per day in 2020. These values should be compared to the conformity threshold level of 0.27 tons per day for areas

maintaining compliance with the PM_{10} NAAQS. Again, the conformity threshold is greatly exceeded by the estimated emissions increase due to Mexican-domiciled trucks.

The second area analyzed was San Diego, which is a serious ozone nonattainment area and is in attainment with the current PM_{10} standards. The same assumptions noted above were again used in combination with the EMFAC2001 model. Figure 10 shows NOx impacts for 2007, 2010, and 2020. As shown, the results are similar to those observed for Houston, with the increase in NO_x emissions due to the assumed operation of Mexican-domiciled trucks growing from about 8 tons per day in 2007 to about 15 tons per day in 2020. These NOx increases offset a substantial portion of the reductions that would be realized from the control of NOx emissions from U.S. domiciled trucks. Even the 8 ton per day value exceeds the 0.14 ton per day conformity analysis threshold by a factor of approximately 50. This means that in order for the threshold not be exceeded, Mexican domiciled trucks would have to account for 1% or less of truck operation in the San Diego area (50% of operation divided by a 50 times reduction required in NOx emissions).

Figure 9

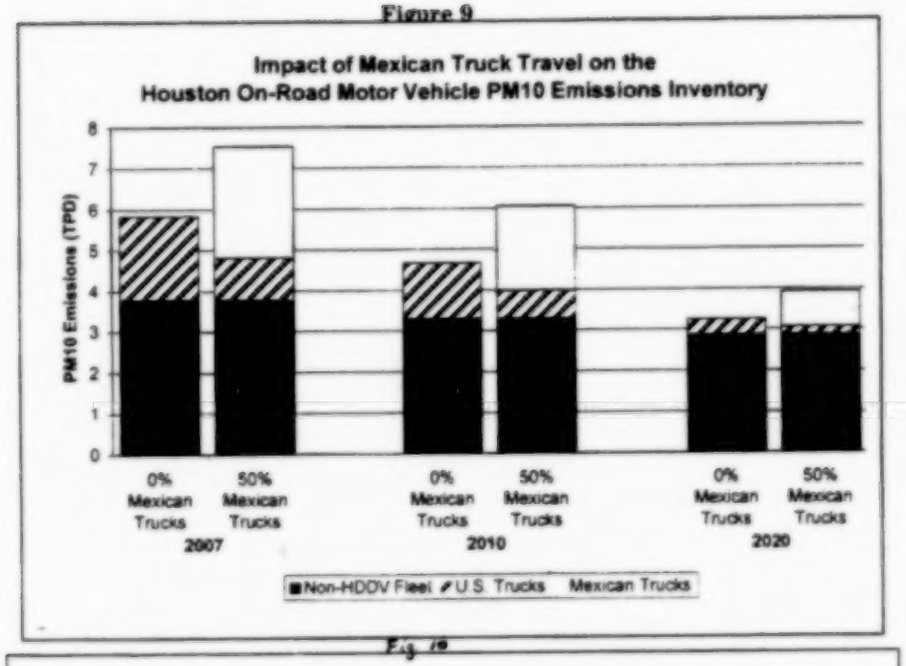
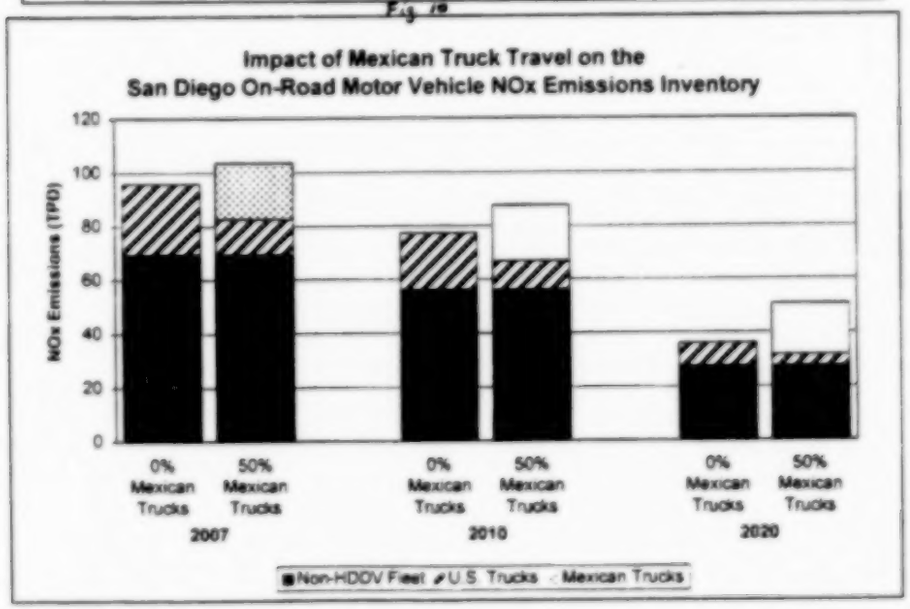
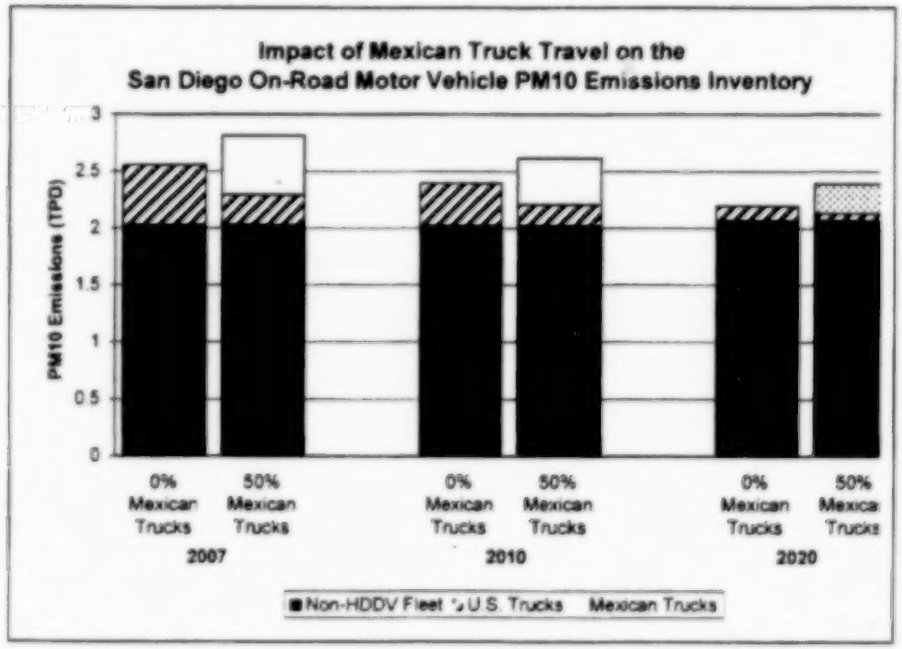


Fig 10



PM_{10} emission impacts for San Diego are shown in Figure 11. Again, they are similar to those observed for Houston but in this case do not exceed the conformity threshold of 0.27 tons per day that applies for areas maintaining compliance with the current PM10 NAAQs.

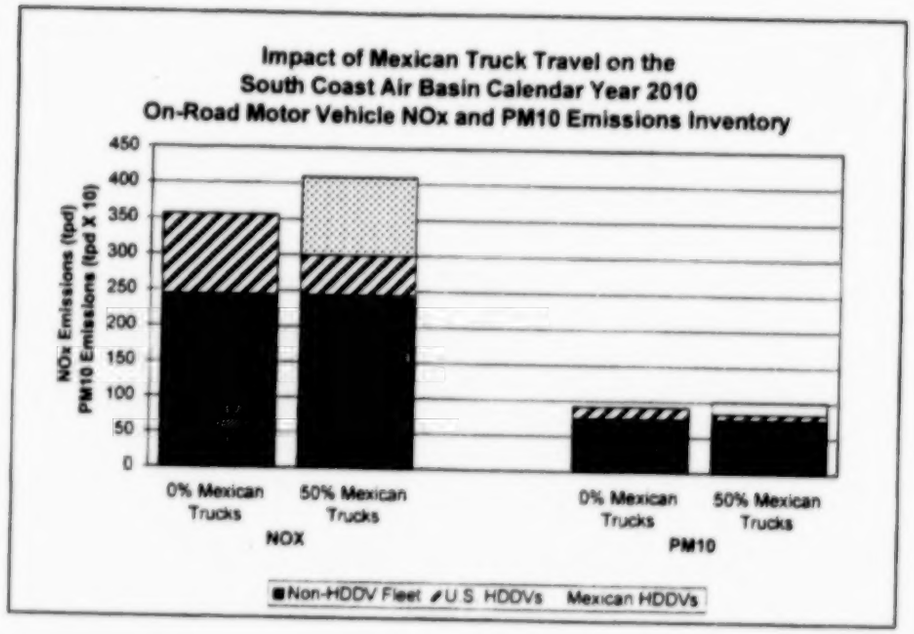
Figure 11



Finally, because it is currently the only extreme ozone nonattainment area in the U.S. as well as a serious PM_{10}

nonattainment area, results are presented for the South Coast Air Basin for 2010, the year that this area must come into compliance with the ozone NAAQS. The results are presented in Figure 12 for NO_x and PM_{10}. As shown, for the scenario analyzed, NO_x emissions would be increased by more than 50 tons per day. Comparing this value to the 0.03 ton per day conformity threshold from Table 1 shows that the emissions impact of this scenario exceeds the conformity threshold by a factor of approximately 1,700. It also indicates that if the impact of Mexican truck operations is to fall below the conformity threshold, Mexican trucks can account for only 0.03% (50% operation divided by a required reduction of 1,700 times) of heavy-duty truck operations in the South Coast Air Basin in 2010. Similarly, direct PM_{10} emissions in 2010 would be increased by about 1.2 tons per day compared to the conformity threshold of 0.19 tons per day.

Figure 12



It should be noted, for all of the examples presented above, that the estimated PM increases do not account for the impact of higher NOx emissions and other factors associated with Mexican-domiciled truck operation on secondary PM levels.

In addition to the above, the impact of increased Diesel emissions due to an increase in the number of safety inspections needs to be examined on a highly localized basis that includes the inspection site itself and the area immediately surrounding the inspection site. Such analyses are routinely performed in response to local, state, and federal requirements for projects ranging

from street widening to the construction of parking garages and new truck terminals and focus in particular on exposures to toxic emissions. No analysis of this type has been performed as part of the EA and, again, it is wholly inappropriate to compare the associated increase in emissions to total nationwide truck emissions for purposes of assessing the significance of impacts.

Appendix A

Estimating the Impacts of Mexican Truck Travel on Emissions from Heavy-Duty Diesel Vehicles in Houston and San Diego

The emissions impacts associated with increased Mexican truck traffic were quantified in terms of the increase in the mass of pollutants emitted per day, i.e., in units of tons per day (tpd). To calculate emissions from on-road motor vehicles, two parameters are generally needed:

- An emission factor (in grams of emissions per mile of vehicle travel, or g/mi), and
- The total number of miles traveled by the vehicles of interest.

By multiplying the g/mi emission factor by the number of vehicle miles traveled per day (mi/day), one obtains an estimate of the daily emissions associated with the vehicles operated in a given area.

For this analysis, it was necessary to generate separate emission factors for the Mexican vehicle fleet and the fleet of U.S.-based trucks operating in the Houston and San Diego areas. That is because the Mexican truck fleet is typically much older than the U.S. fleet, and it has been subject to less stringent emissions standards over the years. The discussion below describes how the emission factors were developed for the Houston fleet, the San Diego fleet, and for Mexican trucks operating in each of these areas. In addition, a sensitivity analysis was conducted for the South Coast Air Basin (SCAB) in California. The approach used for that analysis followed the San Diego analysis.

Emission Factors

The emission factors used in this analysis were derived from several different emission factor models. The California Air Resources Board (CARB) has its own emission factor model (EMFAC2001), which was used to generate the emission factors for the San Diego fleet. The remainder of the country uses the MOBILE6 and PART5 models, which were developed by the U.S. Environmental Protection Agency (EPA).* In addition, a Mexico-[A-2]specific model (MOBILE5-Mexico) was developed in 1996 by Radian International for the Western Governor's Association.* That model is based on an earlier version of MOBILE6 and incorporates model-year vehicle registration fractions (and resulting travel fractions) that are specific to the Mexican vehicle fleet. Since this model is a simplified version of MOBILE that has not been widely used or reviewed by industry professionals, Sierra did not use the model itself to generate emission factors for the Mexican fleet. Instead, as described below, the Mexico-specific travel fractions and some of the model-year-specific emission rate assumptions from the Mexican MOBILE model were applied to standard MOBILE6 model output and EMFAC2001 output to generate gram-per-mile

* Note that the California emissions model, EMFAC2001, estimates emissions of ROG, CO, NO_x, PM_{10}, and $PM_{2.5}$. On the other hand, EPA's MOBILE6 model estimates emissions of VOC, CO, and NO_x, while the PART5 model is used to estimate emissions of PM10 and $PM_{2.5}$.

* "Mexico Emissions Inventory Program Manuals: Volume VI - Motor Vehicle Inventory Development, Final," prepared by Radian International for the Western Governors' Association, Denver, Colorado, May 17, 1996.

emission factors for the Mexican heavy-duty Diesel vehicle (HDDV) fleet.

Houston-Area Emission Factors - EPA's MOBILE6 and PART5 models were used to generate emission factors for the U.S.-based fleet operating in the Houston area. These models were operated in their default modes, which assumes national average model-year registration distributions (i.e., the percentage of HDDVs within each model year).

Both models allow the user to select an optional model-year specific output format specifically for "Class 8B" heavy-duty Diesel vehicles. This output format was used to obtain individual g/mi emissions estimates, as well as travel fractions (i.e., the fraction of total HDDV mileage accumulated by each individual model year making up the fleet) for the 25 separate model years that are assumed to make up the in-use fleet. Composite emission factors for each calendar year analyzed are then calculated by multiplying each model-year travel fraction by its corresponding emission factor, then summing the total of these products. A sample calculation for NOx emissions in calendar year 2010 is shown in Table 1 for the MOBILE6 model.

Several points are worth noting with respect to the baseline MOBILE6 estimates contained in Table 1:

- Twenty-five different model years are assumed to make up the fleet, with newer vehicles contributing more to the total miles traveled than older vehicles (i.e., the travel fraction for newer vehicles is greater than it is for older vehicles). That is because there are more of newer vehicles in the fleet (older vehicles are

removed through attrition) and newer vehicles are typically driven more than older vehicles.

- The travel fraction and emission rate for model year 2010 is assumed to be zero in the example above. That is because the model was run for a January 1 basis, and new HDDV sales are assumed to begin on January 1 of the calendar year being analyzed. This is slightly different than the case for light-duty vehicles, in which new model year sales are assumed to being in October 1 of the previous calendar year.

Table 1

Sample calculation of Calendar Year 2010 HDDV Class 8B No_x Emission Rate Based on MOBILE6 (January Basis)

Model Year	Vehicle Age	Travel Fraction	Nox Emission Factor (g/mi)	TfxEF (g/mi)
2010	0	0.0000	0.000	0.000
2009	1	0.1529	3.478	0.532
2008	2	0.1296	3.554	0.461
2007	3	0.1100	3.623	0.398
2006	4	0.0932	6.805	0.634
2005	5	0.0790	6.890	0.544
2004	6	0.0670	6.966	0.467
2003	7	0.0568	7.916	0.450
2002	8	0.0482	11.420	0.550
2001	9	0.0408	16.287	0.664
2000	10	0.0346	16.339	0.566
1999	11	0.0293	16.386	0.481
1998	12	0.0249	18.787	0.468
1997	13	0.0211	20.299	0.429
1996	14	0.0178	20.109	0.359
1995	15	0.0152	20.720	0.315
1994	16	0.0129	20.726	0.266
1993	17	0.0109	28.889	0.315
1992	18	0.0092	30.170	0.278
1991	19	0.0078	24.473	0.192
1990	20	0.0066	22.855	0.152
1989	21	0.0057	28.471	0.161
1988	22	0.0048	27.679	0.132
1987	23	0.0041	26.477	0.108
1986	24	0.0175	26.477	0.464
Fleet-Average Emission Rate (=Sum of TF X EF):				9.39

Note that two adjustments were made to the $PM_{2.5}$ and PM_{10} emission factors generated by the PART5 model to reflect recently promulgated EPA rules that are not accounted for in the base version of that model: (1) a

90% reduction in HDDV exhaust PM emission rates was applied to 2007 and newer model year vehicles; and (2) the sulfate portion of the exhaust emission rate for pre-2007 model year vehicles was reduced to reflect low-sulfur Diesel fuel requirements (i.e., 15 ppm sulfur) that are implemented nationwide in 2007. Note that the NOx elements of the 2007 HDDV rule are incorporated in the base MOBILE6 model.

For the sake of consistency, the HDDV travel fractions generated with MOBILE6 were used to calculate the composite emission factors from both models. We chose to use the MOBILE6 travel fractions rather than those from PART5 because the MOBILE6 fractions are more current and are therefore a better representation of the in-use fleet.

San Diego Area Emission Factors - CARB's EMFAC 2001 model (version 2.07) was used to calculate the emission factors for the San Diego area. The model was run such that model-year-specific emissions were selected.* However, EMFAC2001 calculates emission factors for as many as 45 different model years, with 1965 being the oldest model year considered by the model. This fundamental difference in the modeling approaches for the MOBILE6 vs. EMFAC2001 models results in a slightly greater percentage of emissions assigned to higher-emitting, older vehicles in the EMFAC2001 result than in the MOBILE6 result. This effect is slightly offset by the fact that older vehicles do not travel as many miles per year, so the total gram-

* The output from EMFAC2001 is tons per day of pollutant. Because daily vehicle miles traveled are also reported in the model output, it was possible to divide the emissions estimates (in tons per day) by the daily VMT to arrive at a g/mi value for each model year considered by the model.

per-mile emission factors are comparable between the two models.

Inspection of the EMFAC2001 output showed that although the 2007 heavy-duty vehicle NOx standards recently adopted by both the EPA and CARB are reflected in the modeling results, the new 2007 PM standards are not. Starting in 2007, the PM certification standards are due to be reduced by 90%. To account for this apparent error in the base EMFAC2001 model, Sierra reduced the 2007 and newer model year EMFAC PM emission rates by 90%.

Mexican Fleet Emission Factors - As noted above, the Mexican MOBILE model is not widely used. Therefore, to generate model-year emission factors for the Mexican fleet, the model- year output from the MOBILE6, PART5, and EMFAC2001 models was modified to represent Mexican HDDVs via the application of a model-year mapping system. This mapping system essentially involves synchronizing the model-year Mexican HDDV emission standards and the U.S. model-year emission factors to which they most closely correlate. Mexico adopted its first HDDV standards in 1993 - standards identical to the Federal US HDDV standards already in place at that time. In addition, Mexico followed the US EPA's lead and adopted the more stringent PM10 and NOx standards which were required beginning in 1994 and 1998, respectively. The U.S. subsequently adopted even more stringent HDDV certification standards that go into effect in 2004 and 2007, but Mexico has not followed suit. Thus, it was assumed that the emissions from U.S. and Mexican trucks directly correlate for model years 1993 through 2003 (while their certification standards were identical) but that Mexican trucks sold

after 2003 have no better emissions than the equivalent of a U.S.-certified 2003 model year truck.

Such a mapping strategy was described in the Mexican MOBILE model documentation, but on close inspection did not appear to accurately reflect the Mexican fleet, as represented by the past and current Mexican certification standards. Therefore, Sierra has modified this mapping strategy as follows.

Mexican Model Years 1966-1992 - The first Mexican HDDV standards did not go into effect until 1993, which means any model-year mapping for the years 1966-1992 would require knowledge of those model year specific Mexican HDDV emission rates. In the absence of any such data, the mapping strategy included in the Mexican MOBILE model was used for these model years, as shown in Table 2.

Mexican Model Years 1993-2003 - From 1993 to 2003, the Mexican and U.S. certification standards for HDDVs were identical. Therefore, it was assumed that the emissions for these model year vehicles are the same for U.S. and Mexican trucks, as shown in Table 2.

Mexican Model Years 2004-2020 - Mexico adopted the 1998 U.S. HDDV certification emission standards but has not adopted either the 2004 or 2007 standards, which are progressively more stringent. Therefore, in the absence of any other data, Table 2 shows that we have assumed the emissions from 2004 and subsequent model years are equal to the US 2003 levels—the last year the U.S. and Mexican certification standards were synchronized.

Table 2
U.S. to Mexican Model Year Mapping

Mexican Fleet Model Year	Equivalent U.S. MY for Emissions	Mexican Fleet Model Year	Equivalent U.S. My for Emissions	Mexican Fleet Model Year	Equivalent U.S. MY for Emissions
1966	1966	1979	1977	1992	1989
1967	1966	1980	1977	1993	1993
1968	1966	1981	1979	1994	1994
1969	1966	1982	1979	1995	1995
1970	1968	1983	1980	1996	1996
1971	1968	1984	1981	1997	1997
1972	1968	1985	1981	1998	1998
1973	1971	1986	1982	1999	1999
1974	1971	1987	1983	2000	2000
1975	1973	1988	1983	2001	2001
1976	1973	1989	1986	2002	2002
1977	1975	1990	1986	2003	2003
1978	1975	1991	1988	2004+	2003

Model-Year-Specific Emission Rates - The mapping strategy described above was used to determine model-year-specific emission rates for Mexican HDDVs. The emission rates for HDDVs operating in the San Diego area were calculated by applying this mapping strategy to model-year output from the EMFAC2001 model. Likewise, MOBILE6 emission rates were used to calculate the Houston area Mexican HDDV emissions. For example, Table 1 shows that a 1990 model year Mexican truck has emissions comparable to a 1986 US truck. Therefore, emissions from a 1990 model year Mexican truck were assumed equal to the 1986 EMFAC2001 HDDV emission rates in San Diego, and equal to the 1986 MOBILE6 HDDV emission rates in Houston.

For the Houston emission rates, a number of additional adjustments were made to MOBILE6 estimates to best reflect the impact of off-cycle NOx emissions and the "Defeat Device" Consent Decree that was signed by EPA and the engine manufacturers on Mexican-domiciled trucks. Three primary assumptions were made regarding off-cycle NO_x emissions:

- Off-cycle NOx impacts were set to zero prior to model year 1993 and after model year 2001 for Mexican-domiciled trucks;
- The impacts of the Rebuild Program were not included in the Mexican-domiciled truck emission rates; and
- The impacts of the Pull-Ahead Program (i.e., early introduction of the 2004 standards) were not included in the Mexican-domiciled truck emission rates.

Similar adjustments were also made to the San Diego-based Mexican truck emission rates. However, because EMFAC2001 does not contain an explicit adjustment for the rebuild program, no adjustment was made to the Mexican-domiciled trucks to reflect the lack of a rebuild program.

Model-Year Travel Fractions - As discussed above and as shown in Table 1, composite calendar year emission rates are calculated by multiplying the model-year-specific emission rates by the corresponding travel fraction for each model year, and summing these products. The MOBILE5-Mexico model estimates emissions for five different regions in Mexico—Mexico City, Interior Urban, Interior Rural, Border Urban, and Border Rural. However, only three distinct HDDV

travel fractions are calculated by the model: (1) Mexico City; (2) Interior Urban; and (3) Interior Rural, Border Urban, and Border Rural. These three sets of travel fractions, along with an average of the three, are shown in Figure 1. For estimating Mexican truck emission factors for this project, the average was used.

It is interesting to compare the Mexican truck travel fractions to the travel fractions predicted by the MOBILE6 and EMFAC2001 models. That comparison is shown in Figure 2. The estimates from the MOBILE5-Mexico model generally show a maximum travel fraction for vehicles in the 10 to 15 year range, while both MOBILE6 and EMFAC2001 show a maximum travel fraction for the newest vehicles. Because older vehicles typically have higher emissions than newer vehicles (because of emission control system deterioration and standards differences through time), a Mexican fleet would have higher emissions than a U.S. fleet even if the emission standards were the same between Mexico and the U.S. for all model years. Thus both the age of the fleet (and resulting travel fraction differences) and the standards differences contribute to higher average emissions from the Mexican fleet relative to the U.S. fleet.

Figure 1

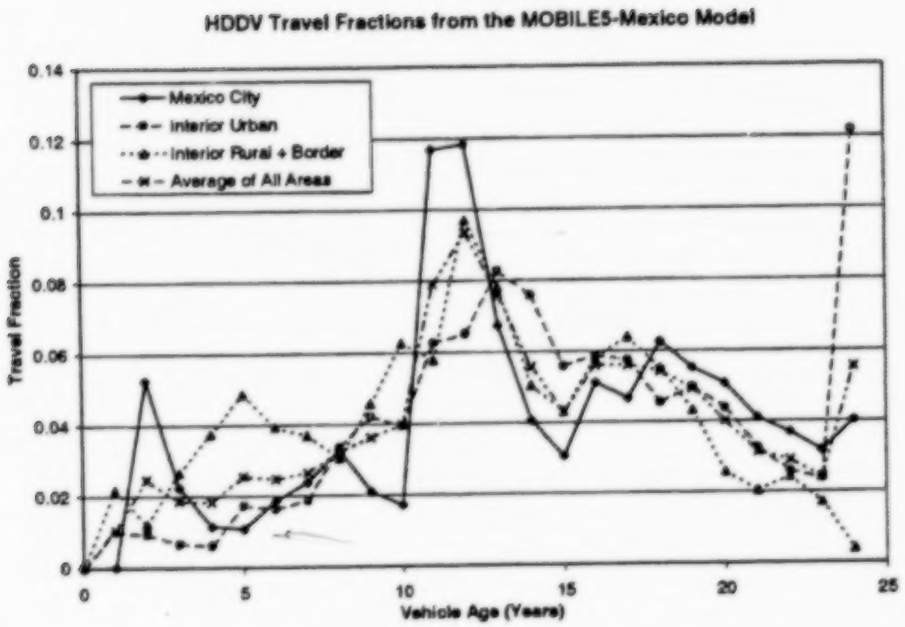


Figure 2

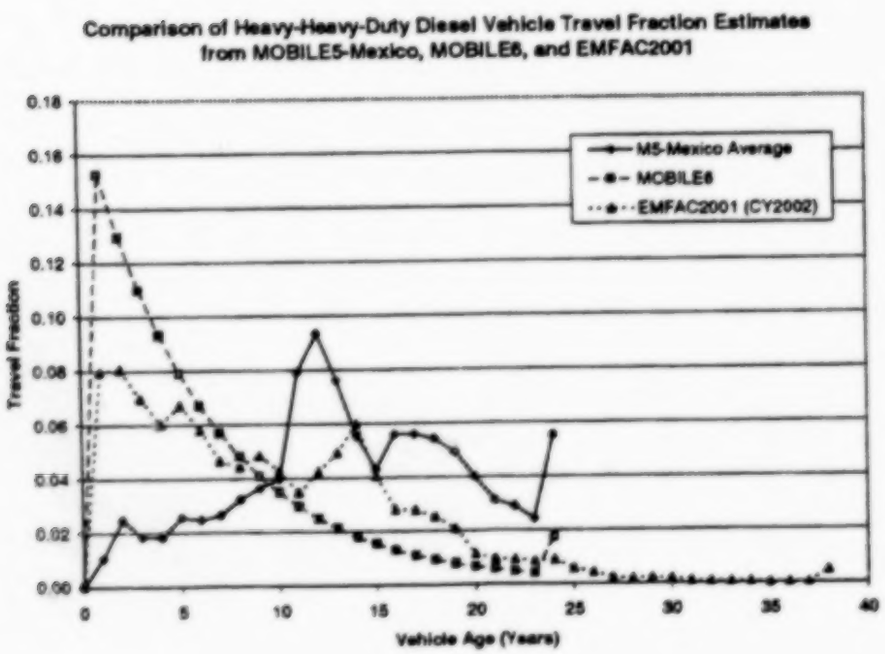


Table 3 compares of the Class 8B HDDV g/mi emission rates calculated for the Mexican fleet and the U.S. fleet (i.e., Houston) based on the MOBILE6 and PART5 models. Two estimates are given in the table—one based only standards differences and the other based on both standards differences and travel fraction differences between the U.S. and the Mexican fleets. Similar results from EMFAC2001 for San Diego are presented in Table 4.

Table 3

Comparison of Gram-Per-Mile Emission Rates of Mexican and U.S.-Domiciled Class 8B HDDVs Using MOBILE6 and PART5

Standards Differences Only—Travel Fractions the Same

	Nox (g/mi)		PM2.5 (g/mi))	
CY	Mexican	U.S.	Mexican	U.S.
2000	25.70	25.45	0.66	0.56
2002	22.96	21.65	0.54	0.47
2007	16.69	13.00	0.34	0.31
2010	14.95	9.39	0.29	0.19
2015	13.46	4.46	0.23	0.08
2020	12.80	2.18	0.21	0.05

	PM10 (g/mi)		VOC (g/mi)	
CY	Mexican	U.S.	Mexican	U.S.
2000	0.73	0.62	1.29	1.05
2002	0.59	0.51	1.07	0.90
2007	0.38	0.34	0.72	0.60
2010	0.31	0.21	0.67	0.49
2015	0.25	0.09	0.61	0.37
2020	0.23	0.05	0.60	0.33

Standards and Travel Fractions Differences Included

	Nox (g/mi)		PM2.5 (g/mi))	
CY	Mexican	U.S.	Mexican	U.S.
2000	31.54	25.45	1.49	0.56
2002	29.23	21.65	1.35	0.47
2007	24.62	13.00	0.82	0.31
2010	22.47	9.39	0.58	0.19
2015	18.03	4.46	0.29	0.08
2020	14.68	2.18	0.21	0.05

	PM10 (g/mi)		VOC (g/mi)	
CY	Mexican	U.S.	Mexican	U.S.
2000	1.63	0.62	3.33	1.05
2002	1.48	0.51	2.67	0.90
2007	0.90	0.34	1.34	0.60
2010	0.64	0.21	1.04	0.49
2015	0.32	0.09	0.71	0.37
2020	0.23	0.06	0.68	0.33

Table 4

Comparison of Gram-Per-Mile Emission Rates of Mexican and U.S.-Domiciled Class 8B HDDVs Using EMFAC2001 for San Diego

Standards Differences Only—Travel Fractions the Same

	Nox		PM2.5	
CY	Mexican	U.S.	Mexican	U.S.
2000	21.53	19.13	0.58	0.45
2002	19.91	18.06	0.49	0.38
2007	16.60	12.82	0.29	0.23
2010	15.05	9.31	0.22	0.15
2015	13.89	5.23	0.18	0.08
2020	13.48	3.32	0.17	0.04

	PM10		VOC	
CY	Mexican	U.S.	Mexican	U.S.
2000	0.63	0.48	1.34	0.96
2002	0.53	0.41	1.17	0.87
2007	0.32	0.26	0.81	0.63
2010	0.24	0.16	0.66	0.48
2015	0.19	0.09	0.56	0.32
2020	0.18	0.05	0.55	0.25

Standards and Travel Fractions Differences Included

	Nox		PM2.5	
CY	Mexican	U.S.	Mexican	U.S.
2000	24.86	19.13	0.84	0.45
2002	23.16	18.06	0.72	0.38
2007	20.42	12.82	0.46	0.23
2010	18.30	9.31	0.33	0.15
2015	16.11	5.23	0.22	0.08
2020	14.43	3.32	0.18	0.04

	PM10		VOC	
CY	Mexican	U.S.	Mexican	U.S.
2000	0.91	0.48	2.01	0.96
2002	0.78	0.41	1.77	0.87
2007	0.50	0.26	1.34	0.63
2010	0.36	0.16	1.08	0.48
2015	0.24	0.09	0.90	0.32
2020	0.20	0.05	0.78	0.25

Inventory Estimates

Emission inventory estimates for NOx, $PM_{2.5}$, PM_{10}, and VOC in units of tons per day (tpd) were generated for the San Diego and Houston areas for two scenarios: (1) no Mexican truck travel, and (2) 50% of the heavy HDDV (Class 8B) travel being made up of Mexican trucks. Because different models were used for the San

Diego and Houston areas, they are covered separately below.

San Diego - As noted above, the San Diego emissions estimates were prepared with the EMFAC2001 model. That model contains estimates of daily vehicle miles traveled (VMT) as well as emission factors, and an emissions inventory (in tons per day) can be generated directly with the model. As a result, it was a straight-forward process to prepare the emissions inventories for San Diego. Two estimates were prepared for this analysis: one assuming no travel by Mexican trucks and one assuming that Mexican trucks would make up 50% of the miles traveled by Class 8B HDDVs. For the first scenario, the model was run in its baseline configuration and the inventory estimates were used directly, with a slight modification to the $PM_{2.5}$ and PM_{10} estimates to reflect the 2007 HDDV standards as discussed above. For the second scenario, the heavy HDDV portion of the inventory was adjusted to reflect 50% Mexican truck travel. This adjustment was performed using the fleet emission factors developed in the previous section for the baseline fleet and the Mexican vehicle fleet. For example, the 2010 NOx emission factors for heavy-HDDVs were calculated as:

- U.S.-Domiciled NOx = 9.31 g/mi
- Mexican-Domiciled NOx = 18.30 g/mi

and the baseline heavy-HDDV NOx inventory is estimated by the model to be 21.27 tpd. To reflect 50% Mexican truck travel, the inventory estimate was adjusted as follows:

50% U.S. Truck Travel = 21.27/2 = 10.63 tpd
50% Mexican Truck Travel = (21.27/2)* (18.30/9.31) = 20.90 tpd

and the resulting heavy-HDDV NOx inventory is 10.64 + 20.90 = 31.53 tpd. This was then added to the non-heavy-HDDV fleet emissions to obtain the total impact of 50% Mexican truck travel on the San Diego inventory.

A summary of the inventory results for San Diego for calendar years 2007, 2010, 2015, and 2020 is contained in Table 5. Note that estimates were also prepared for the South Coast Air Basin (greater Los Angeles area) for 2010 using the same methodology outlined above for San Diego.

Table 5

Baseline San Diego Inventory (tpd) — Adjusted for 2007 PM Standard

Total On-Road Inventory

CY	NOx	PM2.5	PM10	ROG
2007	95.67	2.36	2.56	57.89
2010	77.26	2.21	2.39	46.86
2015	51.24	2.06	2.23	34.25
2020	36.06	2.03	2.20	26.96

Heavy-HDDVs

CY	NOx	PM2.5	PM10	ROG
2007	26.36	0.48	0.53	1.29
2010	21.27	0.34	0.37	1.09
2015	13.32	0.20	0.22	0.82
2020	8.7	0.12	0.13	0.66

San Diego Inventory (tpd)—Assuming 50% of Heavy HDDV Truck Travel Is Mexican Trucks

Total On-Road Inventory

CY	NOx	PM2.5	PM10	ROG
2007	103.48	2.60	2.81	58.62
2010	87.52	2.42	2.62	47.56
2015	65.12	2.24	2.43	34.99
2020	50.59	2.21	2.39	27.66

Heavy-HDDVs

CY	NOx	PM2.5	PM10	ROG
2007	34.17	0.71	0.78	2.02
2010	31.53	0.55	0.59	1.79
2015	27.20	0.38	0.42	1.56
2020	23.23	0.29	0.32	1.36

Houston - The emission factors developed for the Houston area were based on EPA's MOBILE6 and PART5 emissions model. However, in order to generate a ton-per-day inventory estimate, the g/mi emission factors need to be combined with an estimate of vehicle miles traveled (VMT). Unlike the EMFAC2001 model, neither MOBILE6 nor PART5 contain VMT estimates. Instead, the emission factors and VMT estimates are combined outside of the model to prepare an emissions inventory.

The emission factors for Class 8B HDDVs were prepared for Mexican-domiciled trucks and for U.S.-domiciled trucks as described above. However, because it was desired to compare the Mexican truck emissions impacts relative to the entire motor vehicle fleet, it was necessary to prepare inventory estimates for the entire fleet of on-road vehicles. This and PART5 ($PM_{2.5}$ and PM_{10}) with VMT estimates for the Houston area. The

VMT estimates were obtained from the 2022 Metropolitan Transportation Plan for the Houston-Galveston area,* which consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. Those estimates are as follows:

- 2007 - 138 million miles per day;
- 2010 - 146 million miles per day; and
- 2020 - 170 million miles per day.

Using the above VMT estimates with the MOBILE6 and PART5 emission factors,** emission inventory estimates were prepared for two cases: one assuming no travel by Mexican trucks and one assuming that Mexican trucks would make up 50% of the miles traveled by Class 8B HDDVs. The resulting inventories for 2007, 2010, 2015, and 2020 are summarized in Table 6.

---

* "Update of Metropolitan Transportation Plan 2022," Houston-Galveston Area Council, Adopted March 22, 2002.

** Note that the Houston MOBILE6 run prepared for this effort assumed that light-duty cars and trucks would be subject to an inspection and maintenance program as described on the Texas Natural Resource Conservation Commission web page (http://www.tnrcc.state.tx.us/air/ms/motoristchoice.html). In addition, it was assumed that reformulated gasoline would be in place. The MOBILE6 input file used for the baseline inventory development is attached.

Table 6

Baseline Houston Inventory (tpd) — Adjusted for 2007 PM Standard

Total On-Road Inventory

CY	NOx	PM2.5	PM10	ROG
2007	257.08	5.51	5.83	127.93
2010	201.97	4.45	4.67	103.32
2015	115.99	3.42	3.52	75.41
2020	72.52	3.18	3.24	58.28

Heavy-HDDVs

CY	NOx	PM2.5	PM10	ROG
2007	78.33	1.86	2.05	3.58
2010	60.28	1.25	1.37	3.17
2015	31.04	0.58	0.64	2.58
2020	16.55	0.34	0.37	2.48

Houston Inventory (tpd)—Assuming 50% of Heavy HDDV Truck Travel is Mexican Trucks

Total On-Road Inventory

CY	NOx	PM2.5	PM10	ROG
2007	292.05	7.06	7.53	130.18
2010	243.97	5.70	6.04	105.07
2015	163.29	4.13	4.31	76.61
2020	119.94	3.80	3.93	59.61

Heavy-HDDVs

CY	NOx	PM2.5	PM10	ROG
2007	113.30	3.41	3.75	5.83
2010	102.28	2.50	2.75	4.92
2015	78.34	1.30	1.43	3.78
2020	63.97	0.97	1.06	3.81

Attachment

Baseline MOBILE6 Input File for Houston Inventory Development

```
**********      Header Section      *******
MOBILE6 INPUT FILE

POLLUTANTS    :   HC NOX

RUN DATA
**********      Run Section         *******

>ASM Exhaust I/M program for pre-1996 MY
 LDGV/T
I/M PROGRAM          :1  1983  2050  1  TRC  ASM
2525/5015 PHASE-IN
I/M MODEL YEARS      :1 1981 1995
I/M VEHICLES         :1 22222 11111111 1
I/M STRINGENCY       :1 20.0
I/M COMPLIANCE       :1 96.0
I/M WAIVER RATES     :1 3.0 3.0
I/M GRACE PERIOD     :1 2
I/M EXEMPTION AGE    :1 25

> OBD Exhaust I/M program for 1996+ MY
LDGV/T
I/M PROGRAM          :2  1983  2050  1  TRC  OBD
I/M
I/M MODEL YEARS      :2 1996 2050
I/M VEHICLES         :2 22222 11111111 1
I/M STRINGENCY       :2 20.0
I/M COMPLIANCE       :2 96.0
I/M WAIVER RATES     :2 3.0 3.0
I/M GRACE PERIOD     :2 2
I/M EXEMPTION AGE    :2 25
```

```
> OBD Evap I/M program for 1996+ MY LDGV/T
I/M PROGRAM          : 3  1983  2050  1  TRC  EVAP
 OBD
I/M MODEL YEARS      : 3 1996 2050
I/M VEHICLES         : 3 22222 11111111 1
I/M STRINGENCY       : 3 20.0
I/M COMPLIANCE       : 3 96.0
I/M WAIVER RATES     : 3 3.0 3.0
I/M GRACE PERIOD     : 3 2
I/M EXEMPTION AGE    : 3 25

* Assume refueling is included in area source
  inventory
NO REFUELING         :

* Detailed HDDV results
EXPAND HDDV EFS      :

MIN/MAX TEMP         : 77.0 96.0
FUEL RVP             : 6.7
FUEL PROGRAM         : 2 S

* Need to specify season because we are doing
  a January-based inventory
* to be consistent with MOBILE5-Mexico

SEASON               : 1

**********      Scenario Section   *******

SCENARIO RECORD  :  Baseline Houston - CY2007
CALENDAR YEAR    :  2007

SCENARIO RECORD  :  Baseline Houston - CY2010
CALENDAR YEAR    :  2010

SCENARIO RECORD  :  Baseline Houston - CY2015
CALENDAR YEAR    :  2015

SCENARIO RECORD  :  Baseline Houston - CY2020
CALENDAR YEAR    :  2020
```


BILL LOCKYER
Attorney General

State of California
Department of Justice

[Address & Telephone Numbers omitted]

April 18, 2002

VIA FACSIMILE & U.S. MAIL

Honorable Julie Anna Cirillo, Deputy Administrator
Federal Motor Carrier Safety Administration
c/o Docket Clerk
U.S. DOT Dockets
Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

RE: Docket Nos. FMCSA 98-3291, 3298, 3299
Supplemental Comments addressing FONSI and Final Programmatic Environmental Assessment dated January 16, 2002

Dear Deputy Administrator Cirillo:

California Attorney General Bill Lockyer, acting in his independent capacity to protect the natural resources of the State of California, respectfully summits the following comments to the Federal Motor Carrier Safety Administration's ("FMCSA") Finding of No Significant Impact ("FONSI") and Programmatic Environmental Assessment ("PEA") dated January 16, 2002, and made public on March 14, 2002. After careful review and evaluation, we believe that the FONSI and underlying environmental assessment issued by FMCSA are patently inadequate and fatally flawed in terms of scope and methodology used to assess the potential environmental, particularly air quality, impacts that will result if FMCSA implements the

proposed rules and approves registration applications by Mexican motor carriers to operate beyond established commercial zones within the U.S.-Mexico border.

Based on the reasons further discussed below, Attorney General Bill Lockyer strongly recommends that FMCSA reconsider its position and comply with its responsibilities pursuant to the National Environmental Policy Act (42 U.S.C. section 4371 *et seq.*) and the Clean Air Act (42 U.S.C. section 7401 *et seq.*). A technical evaluation of FMCSA's environmental assessment which further supports the Attorney General's comments is enclosed and incorporated herein for consideration. We also incorporate by reference our prior comment letter and prior technical report regarding the regulations, as though set forth in full here.

The National Environmental Policy Act

As previously stated in the Attorney General's October 2001 comments, the National Environmental Policy Act ("NEPA") imposes upon FMCSA certain basic and fundamental requirements in order to adequately assess whether its proposed "federal action," which is defined to include the promulgation of new or *revised* rules and regulations, has the potential for "significantly affecting the quality of the human environment." (42 U.S.C. section 4332(2)(C); 40 C.F.R. section 1508.18(a).) Pursuant to federal regulations promulgated by the Council on Environmental Quality, the "significance" of FMCSA' proposed agency action must be analyzed in several contexts, including "society as a whole (human, national), the affected region, the affected interests, and the locality." (40 C.F.R. section 1508.27(a).) In this context, CEQA regulations require that the severity of the environmental harm should consider "[w]hether the action threatens a violation of

the Federal, State, or local law or requirements imposed for the protection of the environment." (40 C.F.R. 1508(b)(l0).) We believe that the California Health and Safety Code, sections 40919, 40920, and 40920.5 are relevant, in that these statutes impose certain specific legal requirements for air basins in California that are designated as serious, severe, or extreme for attainment of at least one criteria pollutants; there are multiple areas that would be affected by these regulations to which these Health and Safety Code sections apply.

In identifying and assessing the particular "impacts" upon the environment, FMCSA is also required to consider direct, indirect, and cumulative impacts taking place over both short *and* long-term periods of time. (*Id.*; 40 C.F.R. section 1508.8.) "Direct effects" are caused by the proposed action and occur at the same time and place. (40 C.F.R. section 1508.8(a).) "Indirect effects" are caused by the proposed action but occur later in time, are further removed in distance, and are reasonably foreseeable. (40 C.F.R. section 1508.8(b).) And finally, "cumulative effects" are those which result from incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions regardless of which agency (federal or non-federal) or person undertakes such actions. (40 C.F.R. section 1508.7)

Although we are pleased to note that FMCSA now appears to agree with Attorney General Bill Lockyer that the promulgation of the Mexico-domiciled motor carrier rules requires compliance with NEPA (67 FR 12702, 12704), FMCSA has still failed to comply with basic NEPA requirements as outline above and further discussed below. We continue to believe that a full environmental impact statement is the required

evaluation procedure mandated by NEPA. Therefore, FMCSA's environmental assessment does not provide sufficient evidence and analysis to properly evaluate, let alone support, FMCSA's finding of "no significant impact." (40 C.F.R section 1508.9.)

The Clean Air Act

Pursuant to the "conformity provisions" contained in the Clean Air Act, 42 U.S.C. section 7506(c), federal agencies such as FMCSA are prohibited from approving or supporting "in any way" any activity which does not conform to an approved State Implementation Plan ("SIP"). "The assurance of conformity to such an implementation plan *shall be an affirmative responsibility* of the head of such department, agency, or instrumentality." (Emphasis supplied; *Id.*) "Conformity" means that the proposed action or activity will not cause or contribute to new violations, increase the frequency or severity of violations, or delay attainment of various standards, requirements, and milestones. (42 U.S.C. section 7506(c)(l)(B).) Furthermore, conformity to such state implementation plans must be demonstrated in accordance with criteria and procedures as established in federal regulations and existing applicable state requirements. (42 U.S.C. section 7506(c)(4); 40 C.F.R. section 93.150 *et seq.*; 40 C.F.R. section 51.850 *et seq.*) This is precisely the type of federal action that conformity is intended to reach: an activity where federal action makes it much more difficult for a state to meet the federally mandated National Ambient Air Quality Standards. The federal government here is requiring California to meet stringent air quality standards, including the new fine particulate and revised ozone standards for which a SIP call will soon be forthcoming, while simultaneously approving the

entry into California of a very significant new source of pollutants that will make it more difficult to attain these standards.

Under federal regulations, FMCSA is required to conduct a conformity determination for *each pollutant* where the *total* of direct and indirect emissions[1] in a nonattainment or maintenance area caused by the proposed action would either (1) equal or exceed any of the rates as established by the U.S. Environmental Protection Agency ("US EPA") in 40 C.F.R. sections 51.853(b) and 93.153(b), and/or (2) constitute 10% or more of a nonattainment or maintenance area's total emissions of that pollutant (i.e. federal action which is "regionally significant"). (40 C.F.R. sections 51.853(i) and 93.153(i).) The determination of conformity must be based upon "the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates." (42 U.S.C. section 7506(c)(l)(B); 40 C.F.R.

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[1]"'Direct emissions' means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal agency action and occur at the same time and place as the action." (40 C.F.R. sections 93.152 and 5 1.852.) "'Indirect emissions' means those emissions of a criteria pollutant or its precursors that: (1) are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and (2) the Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." (*Id.*) "'Total of direct and indirect emissions' means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the 'net' emissions considering all direct and indirect emissions." (Id.)

sections 93.159(a) and 51.859(a).) [2] With regard to motor vehicle emissions, the U.S. EPA's most current emissions model must be used for a conformity analysis. (40 C.F.R. section 93.159(b)(l) and 51.859(b)(l).) Furthermore, the conformity determination required to be performed by FMCSA must reflect emission scenarios that are expected to occur under each of the following cases: (1) the CAA's mandated attainment year, or if applicable, the farthest year for which emissions are projected in the maintenance plan; (2) the year during which the total of direct and indirect emissions are expected to be the greatest on an annual basis; and (3) any year for which the applicable SIP specifies an emissions budget. (40 C.F.R. sections 93.159(d) and 51.859(d).)

Instead of accepting and performing its affirmative duties as required by the CAA's conformity determination provisions, FMCSA, in response to Attorney General Bill Lockyer's October 2001 comments, has indicated that its proposed action does not require a conformity determination. (67 FR 12702, 12704-05.) The basis for this erroneous determination is grounded on FMCSA's contention that the proposed action is exempt because the proposed rules (1) "would result in no increase in emissions or clearly a de minimis increase" and (2) do "not exceed certain threshold emissions rates set forth in 40 C.F.R. 93.153(b)." (*Id.*) Although not expressly stated in its response to the Attorney General's prior comments, it appears that FMCSAis relying upon its NEPA environmental assessment and "finding of no significant impact" to

[2] Any revision to these estimates must be approved by the MPO or other agency authorized to make such estimates for the urban area. (40 C.F.R. 51.859(a)(2).)

support this groundless contention. Consequently, because FMCSA's environmental assessment is fatally flawed and deficient, FMCSA's basis for its determination that its proposed action is exempt from the CAA's conformity provisions is equally flawed. The technical report we are filing today show that a conformity determination is required.

FMCSA's Environmental Assessment is Fatally Flawed

The January 16, 2002 environmental assessment that was prepared on behalf of FMCSA does not comply with the spirit, nor the express applicable provisions of the law as cited above.

The following are a few examples which demonstrate that FMCSA's environmental assessment is completely inappropriate for assessing the air quality impacts at issue:

1. The project is incorrectly defined, its definition artificially limited. As the FONSI itself explains, the FMCSA regulations are essential to the entry of Mexican carriers into this country for long-haul operation, meaning that the environmental effects caused by these carriers' trucks are directly linked to the adoption of the regulations.

2. With respect to FMCSA's air quality evaluation, the document uses incorrect assumptions, outdated data, and a focus that violates CEQA regulations. NEPA requires that the best data be used, in order to fulfill the NEPA mandate of full public disclosure. *(See,* e.g., 40 C.F.R. section 1500.1(b); 40 C.F.R. section 1502.22(a).) FMCSA virtually ignores significant and well documented differences that exist between U.S. and Mexico emission standards for heavy-duty diesel

trucks. These emission differences can be attributed to many reasons, including:

(a) *Age Distribution Differences*: As recognized in many reliable sources of data, including the February 21, 2001 report entitled "North American Trade and Transportation Corridors: Environmental Impacts and Mitigation Strategies," prepared for the North American Commission for Environmental Cooperation by ICF Consulting, on average, the Mexican fleet of heavy-duty diesel vehicles are older than the California fleet of vehicles. Accordingly, because older trucks generally have higher emissions than newer vehicles, the Mexican fleet will have higher emissions than the California fleet. These emission differences will become even more significant in the near future (i.e., years 2004, 2007, etc.) as the United States federal government (through US EPA) and California carry out the future heavy duty diesel truck emission.

(b) *Regulatory Differences*: It is also well recognized that prior to 1993, Mexican heavy-duty engines were not regulated. Thus, while *current* Mexican emission standards correspond to U.S. *current* standards, the past and future standards for heavy-duty vehicles were and will be more restrictive than those applicable to Mexico-domiciled heavy-duty vehicles. Consequently, those pre-1993 heavy-duty vehicles which are in operation now, and will continue to be in operation for the foreseeable future, will emit at higher levels miles than comparable California or Federal trucks throughout their useful lives, which might be well over one million miles.

(c) *Legal Enforcement Differences*: The federal government has entered into a consent decree with U.S. heavy-duty diesel engine manufactures which require the manufactures to retrofit heavy-duty engines in order to correct a "defeat device" employed by manufacturers to circumvent emission regulations. These "retrofit" agreements do not apply to Mexican or Canadian vehicles, thus resulting in higher per vehicle emissions for Mexican line-haul trucks compared with California or other federal trucks.

(d) *Diesel Fuel Composition Differences*: Commencing in 2007, Federal and California diesel fuel standards will require very significantly lower levels of sulfur, which should result in lower emission levels of some pollutants. Further, and of increasing importance as the new diesel emissions standards take effect in future years, low sulfur fuels will be an absolute necessity to allow new emission control devices such as particulate traps to function. At the present time, we are not aware of any evidence indicating that Mexico will adopt, and later implement and enforce, similar low sulfur diesel fuel standards.

3. In performing its environmental assessment for potentially significant air quality emission impacts caused by the Mexico-domiciled motor vehicles, FMCSA is required to conduct its assessment by evaluating emission impacts on regional and more localized areas of concern that are potentially affected by the projected emissions. (40 C.F.R. section 1508.27(a); 42 U.S.C. section 7506(c)(l)(B); 40 C.F.R. sections 93.150 *et seq.* and 51.850 *et seq.*) In California, there exists several "nonattainment" areas of concern which will be

impacted by higher emissions from Mexico-domiciled motor vehicles traveling through U.S. freight trade corridors. FMCSA, however, failed to assess the air quality impact of increased emissions and increased ambient pollutant levels in those areas where the impacts of the "no action" and "proposed action" scenarios are likely to be greatest. Instead, FMCSA improperly evaluated overall U.S. emissions and virtually ignored those areas of concern in California which currently do not comply with existing federal air quality requirements and/or are likely to be out of compliance with future U.S. EPA requirements. A map of the areas of California and their ozone attainment status can be found at the California Air Resources Board's website, at *http://www.arb.ca.nov/desig/adm/classi.htm.* A similar map for federal designations can be found at *http://www.epa.gov/region09/air/maps/r9 o3.html.* Another example of the inadequate scope of the evaluation is FMCSA's failure to assess localized air quality impacts caused by the required increase in safety inspections of Mexico-domiciled motor vehicles that will be conducted if the proposed rules are implemented.

Contrary to FMCSA's improper evaluation, the enclosed technical evaluation report includes a "localized area" analysis of emissions from Mexican line-haul trucks, instead of California line-haul trucks, which will impact the Calexico - Mexicali border region in Imperial County, California. This analysis (summarized in Tables 6 - 8 of the report) demonstrates that the emissions increase from allowing access of Mexican line-haul trucking across Imperial County would have increased diesel PM by 2.6% overall or 15% from heavy-duty diesel trucks in the absence of increased vehicle

activity. By any definition, the increased emissions in this area constitute a "significant" impact that requires preparation of a full environmental impact statement for FMCSA's action. In future years, the relative disparity between U.S. and Mexican trucks is expected to be considerably greater as more stringent heavy-duty vehicle emission standards are implemented in California, making the impacts even more significant.

4. FMCSA's environmental assessment, flawed as it is, only purports to examine air quality emission impacts for a one-year fixed period of time, 2002. As set forth above, NEPA and the CAA require that an environmental assessment of potentially significant impacts be conducted for all reasonably foreseeable scenarios which span over short *and* longer periods of time. (40 C.F.R. sections 1508.8 and 1508.27(a); 40 C.F.R. section 93.159(d) and 51.859(d).) To do otherwise impermissibly piecemeals the project and fails to provide the full environmental disclosure that is NEPA's primary purpose. FMCSA provides no explanation why its deficient assessment only covered a one-year period of time. In reality, this single year will itself be almost half over by the time FMCSA contemplates the rules taking effect, making the FONSI apply to only about seven months by its own terms. This is not reasonable by any standard. FMCSA's failure to consider and evaluate the proposed action under a longer and more realistic time horizon results in a failure to properly consider the total indirect and cumulative human environmental impacts (i.e., both criteria and toxic effects of diesel emissions as discussed below) caused by the proposed action. (40 C.F.R. sections 1508.8 and 1508.7; See also 40 C.F.R. sections 51.853(b) and 93.153(b).) In particular, where exposure

to carcinogens is involved, the effects of long-term exposure must be considered, analyzed, and disclosed.

5. As noted in Attorney General Bill Lockyer's October 2001 comments, emissions from diesel engines, which contain VOC constituents that are listed as Federal and California carcinogens, pose the majority (about 70%) of the cancer risk due to ambient toxics concentrations in the South Coast Air Basin. ("Multiple Air Toxics Exposure Study I1 (MATES-II)", published by South Coast Air Quality Management District (March 17, 2000).) Diesel engine exhaust is known to the State of California to cause cancer. (Cal. Code of Regs., tit. 22, § 12000.) In addition, the Science Review Panel of the California Air Resources Board has designated the particulate component of diesel exhaust as a Toxic Air Contaminant. (Cal. Code of Regs., tit. 17, § 93000.) Although our office pointed these designations out in our previous comments, FMCSA appears to ignore the issue altogether. The FONSI contains *no* assessment whatever of potential health risks posed by diesel engine exhaust increases due to the project. Emissions of diesel exhaust from Mexican carriers' trucks are expected to increase under the project, and over time will comprise a larger and larger portion of the overall air toxics emissions inventory for areas such as Imperial County. As set forth above, NEPA mandates that localized impacts from air toxic emissions should be addressed by FMCSA, especially in areas that will be more severely impacted from the proposed increase in diesel truck traffic and emissions.

6. NEPA and the CAA's conformity provisions require FMCSA to use the most recent estimates of emissions, determined from the most recent sources of available data. The emissions model used by FMCSA,

MOBILE5, is outdated and does not incorporate more recent and reliable data available through other sources such as U.S. EPA's MOBILE6, California's EMFAC2001, and the February 21, 2001 CEC report referenced above. (42 U.S.C. section 7506(c)(l)(B); 40 C.F.R. sections 93.159(a) and 51.859(a); 40 C.F.R. 1500.1(b), 1502.22(a).) These more recent emissions models incorporate higher, and more realistic, NO_x emission rates for heavy-duty vehicles. As an example, under MOBILE6, the heavy-duty vehicle per mile emission rate for NO_x is higher than the comparable emission rate under MOBILE5. And, as shown in Tables 5 and 6 of the enclosed report, when Mexican truck emission rates and standards are incorporated into the analysis, the resulting emissions impact from Mexico-domiciled trucks is much greater than that predicted by FMCSA under its flawed evaluation. A similar corresponding analysis for PM emissions also reveals a significantly higher rate of emissions for Mexico-domiciled trucks than U.S. trucks, another fact virtually ignored by FMCSA.

7. In several sections of the environmental assessment, FMCSA makes estimates and assumptions which do not appear to be adequately substantiated by documentary evidence. For example, at pages 2-11 of its report, FMCSA estimates that "about 130,000 of the 4000 trucks and buses that are operating on Mexican Federal roads were built after 1994 (FMCSA 2001h)." The citation, which if credible, is relevant to estimating emissions of the Mexican fleet, is a reference to one e-mail communication between FMCSA and a Mexican bureau. Perusal of the References section of the FONSI shows that out of 48 references cited, seven are e-mail communications, nearly 15% of the total refer-

ences upon which the document relies. Neither the text nor the provenance of these e-mails is provided in the FONSI, and their accuracy is therefore not subject to public review or verification. We expect that any NEPA document will have one or two personal communications on minor points. Here, however, the information that is relied on but not disclosed or documented is more than minor here; it goes to some of the most crucial assumptions upon which the environmental analysis rests, such as number of border crossings expected. This is a violation of NEPA's full disclosure requirements.

Based on the reasons set forth in the previously filed comments, and in the supplemental comments outlined above, as well as the technical reports filed with the comments, we strongly request that FMCSA reconsider its possession and comply with its responsibilities as set forth in NEPA and the CAA which require that: (1) a full and complete Environmental Impact Statement be prepared and submitted for public comment and (2) a conformity determination be prepared to determine the impact of the proposed action on California's State Implementation Plan.

Please contact Susan Durbin at the number listed at the beginning of this letter, or Ed Ochoa at (619) 645-2041, if you have any questions regarding this comment letter.

Sincerely,

/s/ SUSAN DURBIN
SUSAN DURBIN
ED OCHOA
Deputy Attorneys General

For BILL LOCKYER
Attorney General

Enclosure

cc: US EPA Administrator Christie Whitman

ENVIRON

MEMORANDUM

To: Ed Ochoa, CA Attorney General's Office

From: Chris Lindhjem, Alison Pollack, and Doug Daughtery

Date: 18 April 2002

Subject: Review of emissions increases with Mexican heavy-duty diesel trucks operating in California and elsewhere in the U.S.

Executive Summary

The purpose of this document is to provide a critical review of the air quality analysis of the environmental impacts of cross-border diesel truck emissions performed in support of the Federal Motor Carrier Safety Administration's (FMCSA's) Finding of No Significant Impact (FONSI) and the Programmatic Environmental Assessment (FMCSA, 2002). We find many shortcomings in the air quality analysis. The analyses that should be conducted and issues that should be addressed when evaluating the impact of the considered policy options include the following:

(1) The emission model used in the FMCSA, MOBILE5, is outdated and has been replaced with the recent release of MOBILE6 for Federal vehicles. Also, California has developed a similar model (EMFAC2001 is the latest release) for vehicles in use in California, though

EMFAC can be difficult to use with non-standard estimates. In these latest emissions models, NO_x emission rates for heavy-duty vehicles are higher. Use of these models would thus show more significant overall emissions and therefore a greater emissions impact from line-haul trucking activity.

(2) Differences between US and Mexican emission standards for heavy-duty diesel truck engines are not properly addressed. Mexican heavy-duty engines were not regulated before 1993, and future Mexican regulations of these trucks may not correspond to the US regulations starting in 2004, with additional reductions beginning in 2007. Because heavy-duty trucks are used for many years, higher emitting pre-1993 Mexican trucks will still be operating now and for some time to come. Therefore both present and future Mexican trucks will emit at higher levels than comparable California or Federal trucks, a fact not disclosed or analyzed in FMCSA (2002).

(3) Mexican truck fleets are on average older than California truck fleets. Combined with the differences in the emission standards, the older Mexican vehicle fleet will have higher emissions presently and in the future. This was not considered in FMCSA (2002).

(4) The US has entered in legal agreements to retrofit heavy-duty engines to correct a defeat device employed by many manufacturers to circumvent emission regulations. This retrofit agreement does not apply to Mexican vehicles,

thus resulting in higher per vehicle emissions for Mexican line-haul trucks compared with California or other US trucks. FMCSA (2002) did not account for this difference between Mexican and US legal requirements.

(5) Localized impacts from air toxic emissions should be addressed in some areas because those areas, primarily located in border counties, will bear a far greater impact from the proposed increase in Mexican diesel truck traffic than any other area of the US. Evaluating overall US emissions as was done by FMCSA minimizes this impact. We have made a comparison of the effect of Mexican instead of California line-haul trucking for Imperial County using current emissions estimates; the analysis indicates a greater impact on this county than was estimated using US total comparisons.

For these reasons described in more detail in the remainder of this memorandum, California heavy-duty vehicle fleets emit much less than corresponding Mexican vehicle fleets and would impact California counties disproportionately. FMCSA's analysis should have compared the impact of the relative emissions rates between Mexican and California (or Federal for other states) vehicle fleets instead of assuming that these emissions were identical.

Emission Models

The proposed and no change alternatives were analyzed using EPA's MOBILE5 model, which is now an obsolete model. In January 2002, EPA released the dramatically updated version MOBILE6 for estimating

on-road VOC, CO, and NO_X. For heavy-duty trucks and diesel-powered trucks (HDDV) in particular, NO_X emissions are higher in MOBILE6. Light-duty NO_X emissions are lower in MOBILE6, thus increasing the HDDV contribution to on-road NO_X emissions. The heavy-duty vehicle per mile emission rates using MOBILE5 and MOBILE6 are compared later in this document in Table 5, demonstrating higher NO_x levels in general and widening the gap between lower California and higher Mexican vehicle emissions levels when emission standards, age distribution, and legally required rebuilds for US vehicles are appropriately considered.

EPA's model for estimating on-road particulate matter emissions is PART5. This model is very dated, and EPA is working on an update to be incorporated into MOBILE6, but that model revision is not yet available. PART5 PM10 emission rates, adjusted for differences between Mexican and US heavy-duty standards and age distributions, are higher for Mexican vehicle fleets compared with California fleets. FMCSA (2002) erroneously assumed that each fleet emitted at identical levels.

EPA had released a draft version and provided documentation of the MOBILE6 model by early 2001, offered training courses in its use in September 2001, and had conducted and published a number of studies investigating the expected emissions effects with MOBILE6's use. FMCSA (2002) made no mention that the emissions model used in their analysis was expected to significantly change and that NO_x emissions for HDDV were expected to increase markedly.

The State of California Air Resources Board (ARB) has used a California-developed emissions model, EMFAC,

for on-road vehicle emissions inventory model; the latest release of EMFAC2001 that is available is version 2.08. EMFAC estimates VOC, CO, and NO_X, and PM. However, we had difficulty (because of an apparent bug in the model) in applying the Mexican age distribution to provide a comparison in emission rates between Mexican and California heavy-duty vehicle fleet emission rates using EMFAC2001.

One important effect included in EMFAC is the emission reductions associated with the use of California diesel fuel as shown in Table 1. Mexican (and out-of-state) heavy-duty diesel vehicles should have been modeled with higher emissions from the use of diesel fuels purchased out of state but consumed within California. California diesel fuel has additional requirements beyond federally mandated US diesel fuel: CA diesel has restricted the level of aromatics, lower distillation temperatures, and other parameters, and has been shown in testing to produce lower NO_x and PM emissions in test engines.

Table 1. Emission reduction using California diesel fuel instead of US highway diesel fuel.

Model Year	NO_x	PM
1994+	12.5%	10.3%
1991-93	12.5%	30.6%
pre-1991	5.8%	19.9%

Emission Standards

There are a number of assumptions in the air quality modeling FMCSA (2002) that should be revised to accurately assess the relative impacts of either the No Action or Proposed Action cases, both of which allow unrestricted access by Mexican vehicles on US roadways. FMCSA appeared to have assumed Mexican vehicles to be identical to US trucks in terms of the emission standards.

However, there are significant differences in absolute emission levels of the standards and in the implementation dates of those standards. Shown in the Tables 2-4 are the past, current, and future applicable standards for California, US Federal (including future California), and Mexican vehicles. While the current Mexican emission standards correspond to US standards, the past and future standards for US heavy-duty vehicles were and will be more restrictive than those applicable to Mexican-regulated heavy-duty vehicles. There were no applicable emission standards for Mexican heavy-duty vehicles prior to 1993, and previous assessments (ICF, 2001) acknowledged and included this in their modeling, though FMCSA (2002) did not include this fact in its analysis. Future year effects were not modeled in FMCSA (2002), though the emissions from future US and Mexican vehicles are expected to diverge more widely than the emissions from current vehicles.

Table 2. California HDDV emission standards (g/bhp-hr).
(Urban buses have different standards for some model years).

Year	HC	CO	NOx	PM
1987-90	1.3	15.5	6.0	0.60
1991-93	1.3	15.5	5.0	0.25
1994+	1.3	15.5	5.0	0.10

Table 3. Federal HDDV emission standards.
(Urban buses have different standards for some model years).

Year	HC	CO	NOx	PM
1985-87	1.3	15.5	10.7	None
1988-89	1.3	15.5	10.7	0.60
1990	1.3	15.5	6.0	0.60
1991-93	1.3	15.5	5.0	0.25
1994-97	1.3	15.5	5.0	0.10
1998+	1.3	15.5	4.0	0.10
2004+	2.4 or 2.5 NMHC+NOx, limit of 0.5 on NMHC	15.5		0.10
2007+	0.14 NMHC proposed	15.5	0.2	0.01

Table 4. Mexican HDDV emission standards.

Year	HC	CO	NOx	PM
1993	1.3	15.5	5.0	0.25
1994-97 (HH urban bus/MH, light, other buses)	1.3	15.5	5.0	0.07/0.10
1998+ (HH urban bus/MH, light, other buses)	1.3	15.5	4.0	0.05/0.10

It should be noted that Federal and California regulations for 2007 and later engines require that diesel fuel sulfur levels to be significantly lower than diesel fuel currently produced to enable the future engine exhaust standards to be met. Without such lower sulfur levels, vehicles meeting the US emission standards may not be able to operate properly in Mexico or

may unintentionally compromise their emission control devices. We are not aware of any plans for Mexico to adopt similar low sulfur diesel fuel regulations; if not, then California vehicles that purchase fuel in Mexico and return to operate within California will have compromised their emission control devices.

Mexican trucks using the current California diesel could have reduced NO_x and PM emissions from current levels. Additional, though marginal, PM emissions reductions could be realized with use of the future Federally mandated lower sulfur diesel fuels, though Mexican adoption of all of the U.S. emission standards (including exhaust) would realize greater benefit.

Age Distribution

Based on the quote below, it appears that the FMCSA analysis made no distinction between Mexican and US vehicle emissions or age distribution.

> *"Only heavy-duty gasoline and diesel vehicles and buses were modeled. The default fleet mix for vehicle-miles-traveled as provided by the models was used." FMCSA (2002)*

This assumption ignored previous work (shown below from ICF, 2001; referenced by FMCSA) where significant differences were noted between Mexican and US vehicle fleets in both average age and emission standards and reflected in the estimated age distributions and air quality analysis.

> *"The emission factors are dependent upon the age of the fleet and mileage accumulation rates. The (1999) age distributions for the U.S. and Canadian trucks were based on line haul truck registration data. The trucks were assumed to have national*

average levels of tampering and not subject to an Inspection/ Maintenance program. PM-10 factors only reflect exhaust emissions, not re-entrained road dust. The Mexican line-haul fleet was assumed to have the same age distribution as Canada and the U.S. However, pre-1993 Mexican trucks are treated as unregulated emissions (pre-1988 U.S. fleet with appropriate mileage accumu-lation), since Mexico had no diesel truck emission standards prior to that model year. We assumed the Mexican drayage fleet (for cross-border movements) was an average of five years older than the U.S. and Canadian line-haul fleets, with the resulting net effect that only 10% of the fleet was post-1993 trucks. Diesel fuels in Mexico were assumed to be the same as the U.S., with 500 parts per million (ppm) sulfur." ICF (2001)

In addition, age distribution information is available for several border crossings; these data demonstrate the increased age of the Mexican fleet. ARB has investigated age distributions for California and Mexican vehicle fleets in several border counties including those for Imperial County. Figure 1 compares the ARB assumptions for the age distributions for Mexican and California heavy-duty vehicles in Imperial County; the figure shows that ARB assumes that Mexican vehicles are older on average than their US counterparts.

[Figure 1 Illegible]

Figure 1. 1998 age distribution of CA and Mexican HDDV's is Imperial County. Vertical axis is the proportion of the HDDV fleet corresponding to each year of age.

Consent Decree

In late 1998, the Department of Justice and the U.S. Environmental Protection Agency entered into a Consent Decree with heavy-duty engine manufacturers, who were charged with selling engines equipped with so-called "defeat devices" that allow an engine to pass the EPA emissions test, but then turn off emission controls during highway driving. This result in "off-cycle" NO_x emissions (i.e., emissions from engines running at different operating parameters than in the EPA certification test cycle) being significantly higher for these engines. Among other provisions, the Consent Decree stipulates that the engine manufacturers must provide rebuild kits to reduce the NO_x emissions in 1993-1998 model year trucks. EPA (May 27, 1999) subsequently sent a letter to all rebuilders of engines in the US explaining the requirements that all rebuilt engines with significant rebuilds must rebuild with the low NO_x rebuild kits provided by the engine manufacturers. In a letter from one of the engine manufacturers to its distributors (Cummins, dated June 2, 1999), the breadth of the program is outlined:

"The terms of the Consent Decree apply to the US, as well as other US Territories, including Puerto Rico, The US Virgin Islands, Guam, Samoa, and the Mariana's (Commonwealth of the Northern Mariana Islands). It does not apply (at this time) to rebuilds in Canada, Mexico, or other areas of the world."

It is important to note that Mexican and Canadian trucks are not included in the rebuild program.

EPA, in its technical documentation for MOBILE6, describes its assumption of the effect of the rebuilds on emissions. The background data from this report indicate that EPA is assuming that NO_X emissions for 1994 – 1998 (1993 model year engines are expected to receive little benefit) model year engines will be reduced by about 36 percent from pre-rebuild levels.

In addition, the Consent Decree includes a provision to have the engine manufacturers begin supplying engines meeting the 2004 emission standard in October 2002. The early (October 2002) implementation of this emission standard through the Consent Decree will not apply to the Mexican vehicle fleet. Thus, Mexican vehicles sold from October 2002 to January 2004 would meet a higher emission standard even if the Mexican government adopted the US 2004 emission standards. While Mexican fleet owners might consider purchasing engines meeting the U.S. Consent Decree requirements during this period, we expect that such engines would not be available outside the U.S.

Emissions Comparisons

Sets of emission runs were made using a variety of emissions models and other calculations using assumptions associated with these emissions models.

We compared the emissions associated with the differences in the emission standards and age distributions between California and Mexican heavy-duty trucks using MOBILE5b, MOBILE6, and PART5. All runs were made at 55 miles per hour average speed, the expected speed for line-haul trucks passing through Imperial County, a border county in California. To compare MOBILE5 and MOBILE6, an average of all heavy-duty diesel vehicles (HDDV include large pickup trucks through line-haul trucks) is presented to compare results using more realistic estimates than those assumed by FMCSA (2002), where Mexican and California vehicles emission rates were assumed to be identical. In all cases, Table 5 shows that the absence of pre-1993 emission standards, combined with the advanced age of the Mexican vehicles, produced higher emissions rates for the Mexican vehicle fleet than those predicted for the California vehicle fleet. MOBILE6 also allowed for estimating what would occur if these truck engines completely eliminated the use of the defeat device outlined in the Consent Decree. In each case in Table 5, the emission model indicated was used, along with the best available data and information to properly represent the age distribution and emission standards described under each scenario.

Table 5. Year 2000 emission rates using a range of assumptions.

Model	Scenario	HDDV Emission Factors (g/mi)			
		VOC	NOx	CO	PM10
MOBILE5b	California 1998 Reg. Dist.*	1.26	19.1	6.6	-----
MOBILE5b	Mexican Stds. & Reg. Dist	1.40	22.5	7.1	
		(+11%)	(+18%)	(+8%)	-----
MOBILE6	California 1998 Reg. Dist.	0.85	22.1	5.1	
		(-33%)	(+16%)	(-23%)	-----
MOBILE6	Mexican Stds. & Reg. Dist.	1.22	24.7	7.7	
		(-3%)	(+29%)	(+17%)	-----
MOBILE6	California 1998 Reg. Dist. No Defeat Device	0.85	19.4	5.1	
		(-33%)	(+2%)	(-23%)	-----
PART5	California 1998 Reg. Dist.*	-----	-----	-----	1.188
PART5	Mexican Stds. & Reg. Dist.	-----	-----	-----	1.482
					(+25%)

* Closest assumptions to those used in FMCSA for both Mexican and California vehicles

The version of EMFAC2001 currently available could not run a comparison of both Mexican and California fleets.

Because the line-haul Mexican vehicles allowed unrestricted access to California roadways would be among the heaviest (GVW>33,000 lbs) trucks (also called heavy-heavy duty diesel vehicles [HHDDV]) used on the roadways (FHWA, 1997), a more realistic

comparison is to compare emission rates using heavy-heavy duty diesel vehicle emissions. The latest version of EMFAC2001 (2.08) that was available did not allow nonstandard registration distributions for all vehicle ages, so a simulated method was used employing the emission rates and correction factors available in the public documentation for EMFAC2001. From the results shown in Table 6, Mexican trucks produced 3 to 7 g/mile (+15 to 30%) more NO_x and 0.3 to 0.6 g/mile (+25 to 75%) more PM than equivalent California trucks operating in Imperial and other California counties in 2000, depending upon the model used to determine emission rates and the fuel used by Mexican trucks. The gap widens in future years (2010) to 40% more NO_x and 110% more PM per Mexican truck than a comparable California truck.

Table 6. Year 2000 (unless otherwise noted) HHDDV emission comparisons using PART5, MOBILE6, and simulated EMFAC estimates.

Estimates	NOx (g/mile)	PM10 (g/mile)
PART5 California Reg. Dist.	-	1.45
PART5 Mexican Stds. & Reg. Dist.	-	1.78
MOBILE6 California Reg. Dist. *	23.9	-
MOBILE6 California Reg. Dist.	28.2	-
MOBILE6 Mexican Stds. & Reg. Dist.	30.9	-
Simulated EMFAC California Reg. Dist.	21.5	0.78
Simulated EMFAC Mexican Stds. & Reg. Dist.	22.7	1.09
Year 2000 Simulated EMFAC Mexican Stds. & Reg. Dist. (without CA fuel)	24.7	1.35

Year 2010 Simulated EMFAC California Reg. Dist.	13.0	0.35
Year 2010 Simulated EMFAC Mexican Stds. & Reg. Dist. (without CA fuel)	18.3	0.74

* No Defeat Device

MOBILE5 does not permit analysis of HHDDV emissions separate of other HDDV.

The version of EMFAC2001 currently available could not run a comparison of both Mexican and California fleets.

It is expected under the No Action and Proposed action cases that within Imperial County, Mexican trucks would continue driving through Imperial County instead of transferring their loads to California vehicles near the border, resulting in approximately an additional 50 miles of travel within Imperial County by the Mexican line-haul trucks instead of this same mileage being driven by California trucks. In 2000, there were 281,032 northbound truck crossings at Calexico (FMCSA, 2002). The emissions impact of these freight transfers occurring using Mexican line-haul trucks instead of California trucks across Imperial County alone is shown in Table 7, not accounting for any increases in trade or other vehicle activity across the border using a low impact case (using California diesel fuel), and a higher impact case using the more realistic assumption that Mexican vehicles use Mexican fuel. Table 7 reflects the emission increase only in Imperial County; additional emission increases would be expected to occur in all other California Counties.

Table 7. Air Quality impacts on Imperial County in 2000 of Mexican instead of California line-haul trucking.

	NOx (tons/day)	**PM10 (tons/day)**
Low Impact Case (California diesel fuel)	0.13	0.013
Typical Case	0.30	0.026

To compare this to the current emission levels, the emission inventory for Imperial County is shown in Table 8. Table 8 indicates that the emissions increase from allowing access of Mexican line-haul trucking across the county would increase diesel PM by 2.6% overall (0.026 tons per day compared with the emissions inventory of 1.01 tons per day for all diesel engines) or 15% from HDDV trucking (0.026 tons per day compared with the emissions inventory from trucking of 0.17 tons per day), even in the absence of increased vehicle activity.

Table 8. Year 2000 Imperial County emissions (tons per day).

Emissions	**TOG**	**ROG**	**CO**	**NOx**	**SOx**	**PM**	**PM10**
Total all sources	32.40	28.46	171.1 8	37.34	1.72	485.0 7	252.1 1
Total Diesel (Nonroad and Onroad)	17.31	15.82	147.8 5	27.31	1.38	1.02	1.01
Total Highway	12.63	11.63	122.1 7	14.64	0.24	0.39	0.39
HDDV (i.e. Trucks)	0.38	0.33	1.48	4.58	0.15	0.17	0.17

In future years, as the US 2004 and later the 2007 emission standards for heavy-duty truck engines are implemented in California but not in Mexican trucks, the relative disparity between US and Mexican vehicle emissions will be considerably greater.

California Clean Air Plan

One initiative planned under the California Clean Air Plan (CAP) includes a diesel retrofit rule, which will reduce emissions from California registered heavy-duty trucks, but not from out-of-state, Canadian, and Mexican trucks (ARB, 2000).

The rules would require diesel emission control retrofits for refuse haulers, fuel tanker trucks, public and publicly contracted, on-road, and off-road vehicles. Eight-five percent control is expected on 90% of the fleet. The retrofits will likely control PM initially and perhaps NO_x later. These reductions are expected in addition to rules already in place, such as the transit bus and school bus rules.

Table 9. Expected implementation schedule.

Vehicle Fleet	2003	2004	2005	2006	2007
Refuse Haulers	25%	50%	75%	100%	
Fuel Tankers	10%	25%	75%	100%	
Public and Publicly-contracted		10%	25%	75%	100%
Other On-road		10%	25%	75%	100%
Other Off-road		10%	25%	75%	100%

ARB is looking at several different options for implementation. From ARB (2000), a minimum control limit of 85% per vehicle is feasible.

The Clean Air Plan has not yet been formulated for line-haul trucking within California, so we made no estimates in this report concerning the effect this would have on relative Mexican and California truck emissions. However, to the extent that California intends to lower emissions through regulations on California trucking, this will increase the impact that Mexican vehicles will have on air quality in California.

Air Quality Standards

The U.S. EPA has revised the National Ambient Air Quality Standards (*http://www.epa.gov/oar/oaqps/ozpmbro/current.htm*). The revised standards are more stringent for ozone, and there is a new stringent fine particulate matter standard. Based on current ambient air quality levels, most of California is expected to be out of attainment of these stringent ozone and fine PM standards. Increases in California highway emissions of ozone precursors and fine particulate matter from Mexican heavy-duty diesel trucks can only make these standards more difficult for the State of California to meet.

Local Impacts on Toxic Emissions

In the ICF (2001) analysis (cited by FMCSA, 2002) of the environmental impacts of cross-border diesel truck emissions, only five border crossings (three U.S.-Canada. and two U.S.-Mexico crossings) were considered and the analysis focused exclusively on criteria pollutant emissions (NO_x, VOC, CO, PM_{10}, and SO_2). Interestingly, the border crossings analyzed in this report did not include any of the border crossings between Mexico and the State of California, even though the alternative scenario for the Tucson-Hermosillo corridor stated that no trade growth between Sonora and

California will affect the Tucson-Hermosillo corridor because it generally moves through Mexicali-Calexico in Imperial County, California (ICF, 2001).

The State of California has performed a review of ambient toxics and concluded that emissions from diesel engines constitute the majority (about 70%) of the cancer risk due to ambient toxics concentrations in the South Coast Air Basin (SCAQMD, 2000). Diesel engine exhaust contains volatile organic compounds (VOC similar to reactive organic gas (ROG)) constituents that are listed as carcinogens (e.g., acetaldehyde, benzene, and formaldehyde) by the U.S. EPA and the State of California. In addition, diesel particulate matter itself is listed as a pulmonary carcinogen by the State of California and is identified by Federal and State of California agencies to have other noncarcinogenic pulmonary health effects. However, the environmental impact analysis of cross-border truck traffic performed by ICF (2001) or FMCSA (2002) did not consider any impacts from air toxics emissions.

Localized impacts from air toxic emission should be addressed in some local areas since border counties will bear a far larger impact from the proposed increase in diesel truck traffic than the country as a whole (FMCSA, 2002). For border crossings in mainly rural counties such as Imperial County, California, any increase in local air toxic emissions will be even more significant because these emissions reflect a large portion of the overall air toxics emission inventory for these counties. These rural counties will experience a substantial increase in Mexican truck emissions along highly localized transportation routes. Risks resulting from emissions from diesel engine exhaust to populations that work or live near these transportation

corridors will increase with increasing emissions. The impact of air toxics emissions from cross-border truck traffic along these transportation corridors can be estimated at the local level for counties such as Imperial using standard air dispersion modeling and risk assessment methodologies.

Analysis of air toxic emissions due to operation-related emissions such as from vehicular trips are typically required in CEQA analyses[2] and should be done in the National Environmental Policy Act (NEPA) analysis here. The analysis of the impacts for air toxic emissions can be done either on a regional or local scale.

For rural counties like Imperial County, where population centers are small and located near transportation corridors, the impact of air toxic emissions on local populations can be best assessed using a local-scale air dispersion analysis of air toxic emissions. The U.S. EPA's Industrial Source Complex Short Term, Version 3 (ISCST3) model is a straight-line, steady-state Gaussian dispersion model that is commonly used to estimate airborne concentrations due to criteria and air toxic pollutant emissions on a local scale (less than 50 kilometers). At the present time, ISCST3 is EPA's most common regulatory platform for near-field modeling of emissions and is also a preferred air dispersion model for many State and Local agency regulatory applications. ISCST3 provides options to model emissions from mobile sources such as line and area sources. The model considers the following important influences

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[2] For example: 2000. "Notice of Scoping/Initiation of Studies: Interstate 5 Freeway Improvement Study". Letter from Steve Smith, Program Supervisor, CEQA Section of South Coast Air Quality Management District to Ron Kosinski, Chief of the Office of Environmental Planning, Caltrans, District 7. February 15.

on pollutant concentrations: emission rate, physical location and source parameters of the release points, meteorological parameters from the meteorological station nearest to the emission source, and the physical location and height of the user-defined receptor points. The model can estimate air toxic pollutant concentrations at each user-defined receptor location. These predicted air toxic pollutant concentrations can then be used to assess the potential health risk (both for cancer and non-cancer effects) to populations near these transportation corridors using standard risk assessment methodologies and exposure assumptions used in either EPA or California regulatory programs such as the State of California's Air Toxics "Hot Spots" Program (AB 2588).

There are two basic types of inputs that are required to run ISCST3: an input source and control file and a meteorological data file. The input source and control file includes the selected modeling options, source emission rates, source location and parameter data, receptor locations, meteorological data file specifications, and output options. In modeling impacts from diesel truck emissions in Imperial County, it appears that this information is readily available. Receptor locations can be simply modeled as a defined receptor grid in populations centers such as Calexico, El Centro, Imperial, and Brawley (largest distance is about 4 kilometers from Interstate 8 to northern El Centro and, therefore, can be modeled using local air dispersion models) shown in Figure 2. Source locations in these population centers would be the highways where the increase in air toxics emissions from Mexican trucks is expected to occur due to the increased number of Mexican trucks entering the U.S. near the transfer station east of

Calexico (e.g., Interstate 8 and State Highways 86, 98, and 111) as shown in Figure 2. Model inputs for source emissions are discussed in comments above and can be modeled on a mass per mile of highway basis. Several meteorological stations with the meteorological data necessary for air dispersion modeling are also located in the Calexico/El Central/Imperial area as shown in Figure 2.

FMCSA (2002) has completely omitted this kind of analysis, and provided no information on local effects of the No Action and Proposed Actions scenarios. This deficiency does not allow a proper assessment of the air quality impacts.

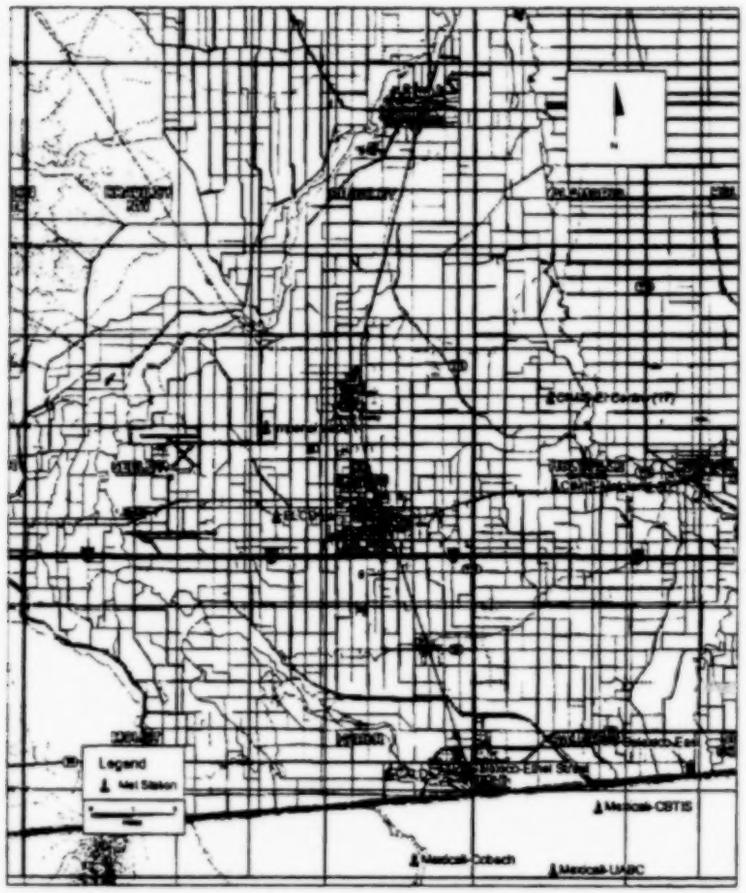

Figure 2. Highways and meteorological stations, Imperial County, California.

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Conclusions

The FMCSA analysis is seriously flawed because it underestimated the emissions impact from the No Action and Proposed Action cases. FMCSA (2002) repeatedly states that their analysis is "conservative." For example, the report states:

> *"The emissions effects and inventories were calculated based on conservative average engine emission factors for Mexican CMV and did not take into account the exclusion of very high emitters. The data and assumptions in this list are generally very conservative so actual emissions from the operation and inspection of Mexican CMV are expected to be significantly lower than those calculated here." FMCSA (2002)*

Far from being conservative, the FMCSA analysis ignored the disparity in emission rates between US, especially California, and Mexican line-haul trucking fleets. FMCSA has ignored several factors which will result in higher emissions in Mexican trucks, and thus underestimates the air quality impacts of the actions analyzed.

Because California/US emissions standards are more stringent than Mexican standards, and because the Mexican fleet is on average older than the US/ California fleet, Mexican truck fleets were expected to have emitted 30% more NO_x and 75% more diesel PM than comparable California truck fleets in 2000. Based on current US and Mexican regulations and legal proceedings (i.e. Consent Decree), the emissions of Mexican trucks operating in California in 2010 are expected to be 40% higher in NO_x and 110% higher in PM. Planned California and Federal efforts to reduce diesel

PM from highway trucking will be ineffectual for the Mexican fleet; as a consequence, over time an even greater fraction of the overall emissions will come from the Mexican fleet.

Diesel exhaust emissions, especially PM, are known to contain air toxics with carcinogenic and noncarcinogenic health effects and may represent the majority of the cancer risk due to ambient toxics concentrations for human populations living and working near transportation corridors. A net emissions increase is noted for the Mexicali-Calexico border crossing due to the use of Mexican instead of California line-haul trucking. In light of these facts and findings, the impacts from air toxics should have been evaluated by FMCSA to inform the public of the potential environmental consequences of these emissions as is required under the NEPA and the CEQA . The localized impacts from this increase in air toxic emissions could have been addressed in FMCSA's (2002) FONSI for counties such as Imperial since the methodologies and the data exist to evaluate these impacts.

We have shown in this report that the Mexican truck fleet will emit more pollutants and more toxic pollutants than comparable California fleets. The State of California will not be able to reduce emissions from these Mexican truck fleets. The disparity between Mexican and California truck fleet emissions will be more significant in the future. The higher emitting Mexican truck fleet means that there will be air quality impacts associated with the unrestricted access of Mexican line-haul trucking to US roadways that were not analyzed in FMCSA (2002).

Emissions from the Mexican trucking fleet can be reduced by using California fuels and by Mexican adop-

tion of US emission regulations and legal proceedings (i.e. Consent Decree). However, the advanced age of the Mexican vehicles will mean that the Mexican truck fleet vehicle will continue to emit at higher rates than comparable California vehicles for some time to come.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-02-2115-CW

PUBLIC CITIZEN, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., DEFENDANTS

DECLARATION OF JAMES MICHEL LYONS, IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

DATE: To Be Determined

TIME: To Be Determined

COURTROOM: The Honorable Claudia Wilken

I, JAMES MICHAEL LYONS, hereby declare:

1. I am a Senior Partner and Senior Engineer at Sierra Research, Inc., a consulting firm that specializes in a wide range of air quality issues, including analyses of vehicle emissions, emissions control technologies, and the associated impacts on air quality. I have been retained by plaintiffs' counsel as an expert witness and make this declaration in support of Plaintiffs' Motion

for a Temporary Restraining Order and Preliminary Injunction.

2. By way of summary, it is my opinion that the Program Environmental Assessment (PEA or EA) at issue in this litigation is seriously deficient in the following respects:

(a) It fails to account for emissions differences between Mexico-domiciled and U.S.-domiciled trucks that exist now and that will become even more significant in the future;

(b) It improperly assesses the air quality impact of the no action and proposed action scenarios by comparing the associated increase in emissions to total nationwide emissions from on-road mobile and all sources;

(c) It fails to assess the air quality impact of increased emissions and increased ambient pollutant levels in those areas where the impacts of the no action and proposed action scenarios are likely to be greatest, which include many areas that currently do not comply with existing federal air quality requirements and are likely to be out of compliance with future federal requirements;

(d) It fails to assess the localized air quality impacts of increased numbers of safety inspections;

(e) It fails to consider increases in emissions of toxic air contaminants resulting from the no action or proposed action alternatives, particularly within the context of the increase in local emissions due to increased numbers of safety inspections; and

(f) It fails to assess the air quality impacts of the no action and proposed action alternatives over more than a single year or beyond 2002.

A. Professional Qualifications

3. In 1983 I received my Bachelors of Science *cum laude* in Chemistry from the University of California, Irvine. In 1985, I received my Masters of Science in Chemical Engineering from the University of California, Los Angeles.

4. From 1985 until 1991, I was employed by the California Air Resources Board in a variety of capacities, including Engineer, Air Pollution Research Specialist, and Senior Air Pollution Specialist. In these positions I analyzed vehicle emissions data for trends and determined the effectiveness of various types of emissions control systems for both regulated and toxic emissions, examined the impact of diesel powered vehicles on ambient levels of toxic air contaminants and assisted in the development of emissions regulations for "gray market" vehicles. I assisted in the identification and control of emissions of toxic air contaminants from mobile sources and also in the determination of effects of compositional changes to gasoline and diesel fuel on emissions of regulated and unregulated pollutants. I developed new test procedures and emission standards for evaporative and running loss emissions of hydrocarbons from vehicles, oversaw the development of the California state plan to control toxic emissions from motor vehicles, and assisted in developing control technologies to reduce emissions of chlorofluorocarbons from motor vehicles.

5. From 1991 to present, my responsibilities at Sierra Research have included, among other things, the

evaluation of the costs, emission benefits, and cost-effectiveness of measures intended to reduce emissions from mobile sources. I have also been involved with the organization and management of testing programs designed to evaluate the effectiveness of motor vehicle emission control programs, including inspection and maintenance programs; the analysis of motor vehicle emissions data; and the development of enhanced testing procedures for motor vehicles. I also provide assessments of the activities of federal, state, and local regulatory agencies with respect to motor vehicle emissions, and report to clients regarding such activities.

6. While at Sierra Research my diverse client base has included petroleum companies and associations (including the Western States Petroleum Association, the American Petroleum Institute, Mobil Corporation, and Texaco, Inc.), vehicle manufacturing associations (including the Alliance of Automobile Manufacturers and the former American Automobile Manufacturers Association), government agencies (including the California Air Resources Board, Environment Canada, the Province of British Columbia Ministry of Environment Lands and Parks and the Greater Vancouver Regional District, and the New York State Energy Research and Development Authority), and other organizations (including Californians For a Sound Fuel Strategy and the Hybrid Vehicle Coalition). I am a member of the American Chemical Society and the Society of Automotive Engineers.

7. In the course of my career, I have authored or co-authored numerous publications analyzing Diesel vehicle emissions, fuels, control technologies, and their impacts on air quality, including the following:

8. "The Impact of Diesel Vehicles on Air Pollution," presented at the 12th North American Motor Vehicle Emissions Control Conference, Louisville, KY, April 1988.

9. "Preliminary Feasibility Study for a Heavy-Duty Vehicle Emissions Inspection Program in the Lower Fraser Valley Area," Sierra Research Report No. 92-10-01, prepared for the Greater Vancouver Regional District, October 1992; and "Phase II Feasibility Study: Heavy-Duty Vehicle Emissions Inspection Program in the Lower Fraser Valley," Sierra Research Report No. SR94-09-02, prepared for the Greater Vancouver Regional District, September 1994.

10. "Analysis of Diesel Fuel Quality Issues in Maricopa County, Arizona," Sierra Research Report No. SR97-12-03, prepared for the Western States Petroleum Association, December 1997.

11. "Future Diesel-Fueled Engine Emission Control Technologies and Their Implications for Diesel Fuel Properties," Sierra Research Report No. SR99-08-01, prepared for the American Petroleum Institute, August 1999.

12. "A Comparative Analysis of the Feasibility and Cost of Compliance with Potential Future Emission Standards for Heavy-Duty Vehicles Using Diesel or Natural Gas," Sierra Research Report No. SR00-02-02, prepared for Californians For a Sound Fuel Strategy, February 2000.

13. "Comparison of Emission Characteristics of Advanced Heavy-Duty Diesel and CNG Engines," Sierra Report No. SR01-05-01, prepared for Western States Petroleum Association, May 2001.

14. A true and correct copy of my curriculum vitae is attached hereto Exhibit 1.

15. At the request of plaintiffs' counsel, Sierra Research was asked to review the Program Environmental Assessment (EA) prepared by the Federal Motor Carrier Safety Administration (FMCSA) considering several proposed actions (hereafter the "Final Rules") that would lift current restrictions that limit operation of Mexico-domiciled heavy-duty diesel vehicles to the immediate border region and thereby increase the number of such vehicles operating in the United States. In co-operation with Philip Heirigs and Lori L. Williams, I reviewed and analyzed the EA, identified serious deficiencies in the FMCSA's air quality impacts analysis contained therein, and then reanalyzed potential air quality impacts, incorporating proper methodologies and assumptions.

16. Mr. Heirigs is a Partner and Senior Professional at Sierra Research, Inc. His responsibilities include preparation of on-road and off-road mobile source emission inventories, evaluation of EPA and CARB emission factor models, and assessment of the costs and benefits of alternative mobile source control measures. Under contract to federal agencies and industry associations, Mr. Heirigs has conducted evaluations of EPA's MOBILE4, MOBILE4.1, MOBILE5a, MOBILE5b, and MOBILE6 emission factors models and CARB's EMFAC/BURDEN models, including detailed analyses of nearly every aspect of MOBILE5 and MOBILE6. Mr. Heirigs has also been responsible for the development of training materials and the delivery of training sessions on the MOBILE5 and MOBILE6 models. His separate efforts have assessed the accuracy of emission inventories developed for a

wide range of Western communities and evaluated the emissions benefits of various motor vehicle control strategies. Prior to joining Sierra Research, Inc., Mr. Heirigs was a Senior Air Pollution Specialist for the California Air Resources Board. A true and correct copy of Mr. Heirigs' curriculum vitae is attached hereto as Exhibit 2.

17. Ms. Williams is an Associate Engineer at Sierra Research, Inc. Her responsibilities include the collection and analysis of data, as well as technical writing support, for a variety of stationary and mobile source emissions projects. Her recent work has included a review of federal, state and local support programs for alternative fuels and alternative fuel vehicles. Other projects have included trip cycle development, I/M program analysis, and statistical analysis of instrumented vehicle data for use in updating the MOBILE5a emission factor model. A true and correct copy of Ms. Williams' curriculum vitae is attached hereto as Exhibit 3.

18. In co-operation with Mr. Heirigs and Ms. Williams, I co-authored a report documenting the review of the EA, the identified deficiencies, and the findings of Sierra Research Inc.'s re-analyses. A true and correct copy of our report is attached hereto as an exhibit to plaintiffs' complaint. This report was submitted to the FMCSA during public comment on the federal rulemaking.

B. The FMCSA's Deficient Environmental Assessment

19. On-road mobile sources include passenger cars and light-duty trucks, motorcycles and heavy-duty vehicles. Among their impacts, on-road mobile sources

significantly contribute to total emissions of volatile organic compounds (VOC), oxides of nitrogen (NO_x), and direct particulate matter (PM) emissions. Heavy-duty Diesel vehicles are of concern from an air quality perspective primarily because they emit substantial amounts of NO_x and PM.

20. Ozone, formed by a complex series of reactions between HC and NO_x in the presence of sunlight, is known to be a strong irritant to the lungs and eyes and at high concentrations causes shortness of breath and also aggravates asthma, emphysema, and other conditions. It is also well known that fine PM can penetrate deep into the lungs where it becomes deposited, causing or aggravating respiratory problems, decreases in lung function, and premature death.

21. The environmental assessment ("EA") prepared by the Federal Motor Carriers Safety Administration ("FMCSA" purports to analyze the potential significance of environmental impacts that may result from the operation of Mexico-domiciled trucks outside of the border region beginning in 2002.

(a) In Section 4 of the EA, the potential impacts of the proposed action on air quality are addressed.

(b) The basic methodology employed in the EA compares emissions from Mexico-domiciled vehicles operating in the U.S. in 2002 under each scenario to total U.S. emissions from *all on-road vehicles in the U.S.* and then to *total emissions from all sources in the U.S.* based on data developed by the U.S. EPA for 1999.

(c) Emissions of Mexico-domiciled vehicles were assumed to be equal to those of U.S.-domiciled vehicles. The numbers of Mexico-domiciled vehicles assumed to be operating in the U.S. under each scenario during 2002 were estimated by FMCSA. These estimates indicate that on the order of 30,000 Mexico-domiciled trucks will begin to operate inside the U.S. beyond the current border areas in 2002 alone.

(d) Emissions associated with proposed safety inspections of Mexico-domiciled vehicles are estimated separately for 2002 using the U.S. EPA MOBILE5b and PART5 emission factor models and are also compared to total U.S. emissions in 1999.

22. The air quality analysis in the EA is fatally flawed due to a number of serious methodological deficiencies and the use of a number of erroneous assumptions. As a result, the methodology used in the EA is completely inappropriate for assessing the relative air quality impacts of the "no action" and "proposed action" scenarios.

23. Among other deficiencies, the EA fails to consider impacts in the proper geographical regions. Second, it fails to evaluate any impacts beyond 2002. Third, it fails to account for differences in emissions between Mexico- and U.S.-domiciled trucks. Fourth, it fails to consider the impacts of emissions of toxic air contaminants.

24. Although we have described these deficiencies in our report in detail, I will summarize some of the basic problems in order to highlight for the Court the extent of the deficiencies in the government's EA.

25. One major defect is the evaluation of the emission impacts of the no action and proposed action scenarios in light of annual *nationwide* emissions from on-road mobile sources and all sources. This approach is completely invalid for the type of analysis in question and its use leads to a dramatic understatement of the significance of air quality impacts.

(a) Air quality issues are typically evaluated under State and federal law for relatively small geographical areas. For example, attainment and nonattainment designations with respect to the various National Ambient Air Quality Standards ("NAAQS") are generally cast in terms of limits on the maximum concentration of pollutants that the public can be exposed to during some period of time. Compliance with the NAAQS is determined for relatively small geographical areas (rather than the United States as a whole) based on air quality monitoring data. Indeed, NAAQS determinations may be limited to areas that represent only a portion of a single county.

(b) The air quality impacts of the proposed action will principally affect localized areas along major trucking corridors which pass through areas that are not in attainment with the current and future ozone and fine PM NAAQS. *It is in these areas where the assessment of impacts needs to be performed.*

26. Another major problem is that the EA analyzes the impact of the no action and proposed action alternatives for only a single year–2002–without any explanation of why this single- year short-term scenario is an appropriate measure of potential air quality

impacts or how this analysis can possibly suffice to assess impacts that will extend into the distant future and will change over time. The government's restricted short-term analysis is simply inadequate to measure the potential significance of air quality impacts, particularly long-term impacts, as we have detailed in our report. Any assessment of the actual impacts of operation of Mexico-domiciled trucks operating in the U.S. needs to consider *both* the short- and long-term impacts, since there are likely to be significant changes in the relative emissions levels and the amount of freight traffic handled by Mexican trucks operating in the U.S. over time. The EA completely ignores these important factors. An appropriate analysis should be carried out over a much longer period extending through 2020, at least.

27. The EA does not properly account for differences in the amount of emissions that results from the per-mile operation of Mexico- and U.S.-domiciled trucks. However, in general, emission levels of Mexico-domiciled trucks have not been, are not now, and will not be the same as those of U.S.-domiciled trucks.

28. In addition, emissions of toxic air contaminants (TAC) from heavy-duty Diesel vehicles are a major air quality concern. TACs that are emitted by Diesel vehicles include directly emitted Diesel particulate matter, benzene, 1,3-butadiene, formaldehyde, and acetaldehyde. The EA improperly failed to consider the issue of increased emissions of TACs whatsoever. As discussed below, Diesel emissions will assuredly increase in certain areas as a result of this action, and emissions of TACs from Diesels will increase as well. The failure to consider TAC impacts runs directly counter to the recent EPA rulemaking setting forth

stringent standards for heavy-duty Diesel vehicles, intended in part to reduce public exposure to TACs. Given this, the impacts of the no action and proposed action alternatives on TAC emissions and ambient TAC levels must be addressed.

29. These are just several of the major defects that invalidate the government's EA with respect to air quality effects.

C. Sierra Research's Analysis of Air Quality Impacts

30. Given the major flaws associated with the EA, we conducted a limited assessment of environmental air quality impacts that would be associated with opening the border to Mexico-domiciled trucks. In conducting this study, we analyzed impacts within two of the geographic areas that will be affected, San Diego and Houston; analyzed both short- and long-term effects through 2020; and focused on emissions of nitrogen oxides, particulate matter, and VOCs. We used latest versions of the state-of-the-art emissions models developed by the United States Environmental Protection Agency (EPA) and the California Air Resources Board (CARB), U.S. EPA MOBILE6 and PART5, and CARB EMFAC2001. The MOBILE/PART and EMFAC emissions models have been developed by these agencies explicitly for the purpose of estimating current and future year emissions from on-road vehicles and are *required* to be used in the preparation of air quality plans for California areas (EMFAC) and other areas of the country (MOBILE/PART).

31. In order to illustrate the potential significance of the problem, we used these models to generate predicted gram-per-mile-traveled emission rates for the average Mexico- and U.S.- domiciled Class 8b heavy-

duty Diesel trucks operated in the San Diego and Houston areas over time. Class 8b trucks are frequently employed in freight hauling over longer distances. Emission rates were calculated for 2002, 2007, 2010, 2015, and 2020.

32. We found that, on average, Mexico-domiciled trucks operating in the San Diego region would presently emit about 1.3 times more NO_x, 1.9 times more particulate matter, and 2.0 times more VOCs than their U.S. counterparts. The emissions control deficit of the Mexican truck fleet will substantially worsen in the next 18 years in the absence of actions to apply the same emissions standards that will apply to U.S. trucks to Mexican trucks. By 2020, the average Mexican truck operating in the San Diego area will emit about 4.3 times more NO_x, 4.0 times more particulate matter, and 3.1 times more VOCs than its U.S. counterpart.

33. Using a similar analysis for the Houston area, we found that the average Mexican truck would presently emit about 1.3 times more NO_x, 2.9 times more particulate matter, and 3.0 times more VOCs than its U.S. counterpart. Again, the emissions control deficit of the Mexican truck fleet will grow substantially in the next 18 years unless actions are taken to apply existing U.S. emission regulations to Mexican trucks. By 2020, the average Mexican truck operating in Houston will emit about 6.7 times more NO_x, approximately 4 times more particulate matter, and 2.0 times more VOCs than its U.S. counterpart.

34. These differences in emissions have serious implications for the air quality within affected regions. It is highly likely that the increased Diesel emissions caused by Mexico-domiciled trucks operating in many areas will be in excess of the conformity thresholds

established by the U.S. EPA to prevent federal actions from causing substantial delays in or preventing nonattainment areas from achieving compliance with existing federal air quality requirements.

(a) For example, based our assumptions the operation of Mexico-domiciled trucks in the Houston area, which is a severe ozone nonattainment area for ozone, would increase NO_x emissions by about 35 tons per day in 2007, 42 tons per day in 2010, and 48 tons per day by 2020. In 2007, these NO_x increases exceed the 0.07 ton per day conformity threshold value for NO_x emissions in severe ozone nonattainment areas, by approximately 500 times (35 tons per day/0.07 tons per day).

35. In San Diego, which is a serious ozone nonattainment area, the operation of Mexico-domiciled trucks would, based on our assumptions, increase NO_x emissions by about 8 tons per day in 2007, exceeding the 0.14 ton per day conformity analysis threshold that applies in serious ozone nonattainment areas by a factor of approximately 50.

36. In the South Coast Air Basin (including the Los Angeles area), which is an extreme ozone nonattainment area and a serious PM_{10} nonattainment area, the operation of Mexico-domiciled trucks in the South Coast Air Basin would, based on our assumptions, increase NO_x emissions by more than 50 tons per day in 2010, exceeding the 0.03 ton per day conformity threshold by a factor of approximately 1,700. Their operations could increase direct PM_{10} emissions by about 1.2 tons per day in 2010, compared to the conformity threshold of 0.19 tons per day.

37. In sum, the federal government's conclusion that there will be no significant air pollution effects from its

action and that a PEA was the appropriate vehicle for examining these impacts is erroneous. The implementation of the regulations may have potentially significant impacts on air quality, as well as serious impacts on the ability of many areas to attain and maintain compliance with federal air quality standards in many areas.

I hereby declare, under penalty of perjury under the laws of the United States and the State of California, that the foregoing is true and correct. Executed this *29th* day of April, 2002, at Sacramento, California.

/s/ JAMES MICHAEL LYONS
JAMES MICHAEL LYONS

SIERRA RESEARCH
1801 J Street
Sacramento, CA 95814

May 20, 2002

Document Management Facility
U.S. Department of Transportation
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400 Seventh Street, SW
Washington, D.C. 20590-0001

Re: Docket No. FMCSA-2001-11060; Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, Interim Final Rule; Request for Comments, 67 Fed. Reg. 12,776 (March 19, 2002)

Re: Docket No. NHTSA-02-11592; Notice 1, Record Keeping and Record Retention, Notice of Proposed Rule Making (NPRM), 67 Fed. Reg. 12,800 (March 19, 2002)

Re: Docket No. NHTSA-02-11593; Notice 1, Importation of Commercial Motor Vehicles, Notice of Proposed Rule Making (NPRM), 67 Fed. Reg. 12,806 (March 19, 2002)

Dear Sir or Madam:

This letter is intended to transmit our expert opinions on two issues that are of concern to our clients. I understand that our background and experience are detailed elsewhere in the record.

The first issue is whether or not the FMCSA's EA analyzes the feasibility of examining Mexican domiciled trucks at border crossings in order to determine their compliance with U.S. emissions regulations at the time of manufacture. While the EA considers the issue of determining compliance of Mexican domiciled vehicles with U.S. safety requirements in detail, it does not, in our opinion, consider in anyway the issue of determining compliance of Mexican domiciled vehicles with U.S. emission regulations. Clearly, this issue should have been thoroughly addressed in the EA before a Finding of No Significant Impact was made.

The United States Environmental Protection Agency has required that new heavy-duty Diesel engines be certified to specific exhaust emission standards for more than 25 years. These standards have become increasingly stringent over time. As a result, engines produced in different model-years may have been certified to different emission standards. It is technically possible to identify heavy-duty Diesel truck engines that have been certified to U.S. standards via labels that are affixed to the engines (rather than the vehicles in which the engines are installed) pursuant to EPA regulations. The current labeling regulations are found at §86.092-35 of Title 40, Code of Federal Regulations and subsequent modifications to that section. The labels are placed on the engines rather than on the vehicles themselves (as is the case with lighter vehicles) because, in general, engines are sold by their manufacturers to separate truck builders who then install engines, sometimes from several different manufacturers, into the truck cabs they produce.

To the extent that Mexican domiciled vehicles were originally produced and sold in the U.S., it would be

possible identify those vehicles if each and every truck was checked by an inspector each time it crossed the border. This inspector would need access to the engine of the truck and verify that the U.S. EPA emissions label was present.

For Mexican-domiciled trucks that were originally produced for sale in Mexico, rather than the United States, the issue of verifying is much more complicated. First, emission standards for U.S. and Mexican heavy-duty Diesel engines have only been equivalent from the 1993 model-year to present and will diverge again with the 2004 model-year (and, in actuality, sooner based on settlement agreements between engine manufacturers and the U.S. EPA.).

For Mexican domiciled trucks with pre-1993 model-year heavy-duty Diesel engines not certified by the U.S. EPA and originally sold in the United States, it will be very difficult to demonstrate emissions equivalency with comparable U.S. vehicles. Prior to the 1993 model-year, emissions from new heavy-duty Diesel engines were not regulated in Mexico and, as indicated in Table 2 of our recent study,* we believe that engines used in Mexican trucks were not equivalent to engines used in U.S. trucks of the same model-year in terms of emission levels.

In summary, the demonstration of emissions equivalency is a complicated issue of considerable importance that should have been evaluated in the EA but was not.

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* "Critical Review of 'Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment,' Prepared John A Volpe Transportation Systems Center, January 2002", Sierra Research Report No. SR02-04-01, April, 16, 2002.

The second issue of concern is what impact on overall emissions there might be if some or many of the heavy-duty truck engines and/or complete vehicles used in Mexico are made in the U.S. and then sold for installation on trucks sold and used in Mexico.

It is important to note that, at present, engines installed in Mexican trucks do not appear to be subject to two sets of more stringent emission standards that apply to U.S. trucks beginning with the 2004 and 2007 model-years. At present, Diesel engines sold in the U.S. and Mexico can, in many cases, comply with applicable emission regulations without the use of components whose sole purpose is to reduce emissions.

In order to comply with the 2004 model-year U.S. engine standards, manufacturers will, in general, be required to incorporate exhaust gas recirculation (EGR) systems into their engines. EGR systems typically involve passage ways and valves (either internal or external to the engine itself) for returning exhaust gases from the exhaust manifold to the intake manifold and as a system that allows the amount of exhaust gas that is returned, as well as the engine operating conditions under which gas is recirculated to be controlled. Addition of EGR systems will increase the cost of heavy-duty Diesel engines.

The primary purpose of EGR systems is to lower NO_x emissions. Such systems provide no improvement in engine power, operability, durability, or fuel economy. In fact, the use of EGR systems on heavy-duty Diesel engines has raised considerable concern regarding decreased engine durability. Given that EGR systems will increase the cost of engines and potentially adversely affect engine durability without providing any benefits other than reduced NO_x emissions, it is un-

likely that manufacturers will incorporate EGR systems into engines sold in countries like Mexico if there are no regulations requiring the additional reductions in NO_x emissions that the systems provide.

In order to comply with the 2007 model-year U.S. engine standards, manufacturers are required to design emissions after-treatment devices capable of achieving nominally 90% reductions in engine out levels of PM and NO_x. It appears that catalytic particulate traps (larger filters that are placed in the exhaust system to trap particulate emissions that are then burned in some manner using catalytic techniques of different types) will be used to reduce PM emission levels to the degree necessary to comply with the standards. NO_x reductions will be achieved with either selective catalytic reduction systems or lean-NO_x adsorber catalysts. Again, these devices must also be added to the engines exhaust system. These after-treatment control systems will be designed for use only with Diesel fuels that contain a maximum of 15 parts per million (ppm) of sulfur.

The application of after treatment control devices to heavy-duty Diesel engines will increase the cost of Diesel engines by at least several thousand dollars and increase truck operating costs. The hardware devices provide no benefit (such as improved fuel economy, engine durability or increased power) other than reduced emissions. To the contrary, these devices will tend to reduce engine power because they increase exhaust back pressure. The use of Diesel fuels with sulfur levels in excess of 15 ppm will reduce the effectiveness of the after-treatment devices and may in some cases permanently damage them.

In our opinion, it is unlikely that these after treatment control devices will be included on engines sold in countries where they are not required to comply with the host country's emission standards or in countries where the maximum allowable limit on Diesel fuel sulfur content is greater than 15 ppm.

Thank you for including these comments in the docket.

Sincerely,

/s/

James M. Lyons
Senior Partner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-02-2115-CW

PUBLIC CITIZEN, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., DEFENDANTS

DECLARATION OF DALE HATTIS, PH.D,. IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

DATE: To Be Determined

TIME: To Be Determined

COURTROOM: The Honorable Claudia Wilken

I, Dale Hattis, declare as follows:

1. I am a professional environmental scientist who has special expertise in the methodology for conducting quantitative health risk assessments for cancer and non-cancer health effects. I have been involved, either as a preparer or peer-reviewer, in numerous studies to determine the aggregate human health impacts of a wide variety of substances, and the risks and benefits of altering exposures to those substances. These have

included studies to determine the effects of heavy-duty diesel engine emissions. I have been retained by plaintiffs' counsel as an expert witness and make this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

2. In summary, it is my opinion that the increased emissions from Mexico-domiciled trucks (especially the fine particulate matter in these emissions) that are expected to result from the implementation of the federal regulations at issue in this lawsuit present a significant public health risk that should be fully evaluated in an Environmental Impact Statement before this federal action takes effect. Careful epidemiological comparisons of death rates among cities with different levels of fine particles in their air indicate that moderate (10 $\mu g/m^3$) differences in fine particle air pollution are associated with approximately a 4% difference in overall mortality—with a concentration in cardiovascular causes of death [Pope, C. A. 3rd, Burnett, R. T., Thun, M. J., Calle, E. E., Krewski, D., Ito, K., and Thurston, G. D. 2002 "Lung cancer, cardiopulmonary mortality, and long-term exposure to fine particulate air pollution," Journal of the American Medical Association March 6, 287(9):1132-1141]. Overall, these results indicate that fine particle air pollution is the single largest environmental public health problem at present in the United States. In aggregate it is expected that moderate decreases in these levels could prevent tens of thousands of premature deaths per year, predominantly from cardiovascular conditions. On the other hand, the increased emissions of fine particulate matter from Mexico-domiciled trucks can be expected to translate into incremental increases in premature deaths, an

enhanced incidence of respiratory diseases, numerous lost work days and increased health care costs.

3. It is also my opinion that the federal government certainly has the wherewithal to perform a reasonable yet comprehensive health risk assessment as part of an EIS and that this should be accomplished so that the public and decisionmakers will know the full consequences of implementing the regulations that will allow more open access to Mexico-domiciled trucks.

A. Professional Qualifications

4. I received my Ph.D. in genetics from Stanford University in 1974 and my B.A. in biochemistry from the University of California at Berkeley in 1967.

5. For the past 12 years I have served on the faculty of Clark University as a Research Professor and Research Associate Professor with the Center for Technology, Environment and Development ("CENTED") of the George Perkins Marsh Institute in Worcester, Massachusetts. Prior to coming to Clark University, for sixteen years I was a Research Associate and Principal Research Associate at the Center for Technology, Policy and Industrial Development at Massachusetts Institute of Technology, Cambridge, Massachusetts. I have also been a Visiting Senior Lecturer at University of California at Irvine.

6. For the past twenty-seven years I have been engaged in the development and application of methodologies to assess the health, ecological, and economic impacts of regulatory actions. My work has focused on the development of methodology to incorporate data on variability in susceptibility among individuals into quantitative assessments for both cancer and non-cancer health risks.

7. I have conducted quantitative risk assessments for hearing disability in relation to noise exposure, renal effects of cadmium, reproductive effects of ethoxyethanol, neurological effects of methyl mercury and acrylamide, and chronic lung function impairment from coal dust, four pharmacokinetic-based risk assessments for carcinogens (for perchloroethylene, ethylene oxide, butadiene, and diesel particulates), an analysis of uncertainties in pharmacokinetic modeling for perchloroethylene and an analysis of differences among species in processes related to carcinogenesis.

8. I have been a Councilor and was recently named a Fellow of the Society for Risk Analysis, and I serve on the editorial board of its journal, "Risk Analysis."

9. I have had extensive prior involvement with diesel health risk issues. For example, in March 1998 I presented a report as an invited comment before the Scientific Advisory Panel that was reviewing an official OEHHA risk assessment for diesel particulates in preparation for advising the California Air Resources Board on the designation of diesel particulates as a toxic air contaminant.

10. I have peer reviewed the U. S. Environmental Protection Agency's Carcinogen Assessment Group (CAG) efforts to develop a diesel health risk assessment for diesel exhaust; I prepared a report for National Institute for Occupational Safety and Health (NIOSH) on the possible use of some short term measurements to investigate rates of possible long term lung damage from diesel engines in underground mines; and I reviewed a risk assessment done by NIOSH based on animal tumor data and later published a paper related to a project for the U.S. Environmental Protection

Agency to develop better methods to project human cancer risks from diesel particles from animal data.

11. I have served as a consultant to the U. S. Environmental Protection Agency's "Clean Air Scientific Advisory Committee" (which was then reviewing an EPA staff draft health assessment document for diesel particles), as a peer reviewer for the U. S. Occupational Safety and Health Administration (OSHA) of a plan by NIOSH for an epidemiological study of diesel-exposed workers in non-metal mines and again at OSHA's request as a peer reviewer of the risk assessment portion of a draft document by the U. S. Mine Safety and Health Administration (MSHA) relating to diesel- risk exposures of metal and non-metal miners. I also served at the request of the Health Effects Institute as a peer reviewer for a report by a panel of theirs on diesel epidemiology.

12. I have served as a litigation consultant on diesel-emissions cancer risks and also to assess the risks from radiation exposure and hexavalent chromium that resulted from discharges to the Columbia River from the various reactors and associated facilities in Hanford, Washington.

13. I currently serve on an EPA panel regarding risk assessment methodology. My complete resume, which is attached as Exhibit 1, lists 170 publications.

B. The Methodology for Assessing the Health Risks of Diesel Emissions from Mexico-Domiciled Trucks

14. I have been retained by plaintiffs' counsel to provide an analysis of the aggregate health risks to the population that are posed by the increased diesel emissions that are expected to be released from

Mexico-domiciled truck engines that may shortly be allowed to operate throughout the United States as a result of ongoing federal rulemaking by the FMCSA.

15. By way of background, comprehensive research studies indicate that inhalation exposure to the fine particulate matter in the air such as that emitted by diesel engines may cause acute and chronic non-cancer respiratory effects, including mortality [C. A. Pope 3rd, D. V. Bates, and M. E. Raizenne, "Health Effects of Particulate Air Pollution: Time for Reassessment?" *Environmental Health Perspectives* 103, 472-480 (1995); J. Schwartz, "Air Pollution and Daily Mortality. A Review and Meta-Analysis," *Environmental Research* 64, 36-52; J. M. Samet, S. L. Zeger, F. Dominici, F. Curriero, I. Coursac, D. W. Dockery, J. Schwartz, and A. Zanobetti, "The National Morbidity, Mortality, and Air Pollution Study Part II: Morbidity and Mortality from Air Pollution in the United States," Health Effects Institute, November 2000]. Recently, a Harvard group has reported the results of using information on the chemical composition of fine particulates to separate the contributions of mobile sources, coal burning, and crustal weathering to the excess daily mortality associated with $PM_{2.5}$ exposures [F. Laden, L. M. Neas, D. W. Dockery, and J. Schwartz, "Association of Fine Particulate Matter from different Sources with Daily Mortality in Six U.S. Cities," *Environmental Health Perspectives* 108: 941-947 (2000)]. They find that a 10 $\mu g/m^3$ exposure to mobile source $PM_{2.5}$ is associated with a 3.4% increase in daily mortality (95% confidence interval 1.7-5.2%), in contrast to the smaller 1.1% response indicated for coal combustion $PM_{2.5}$ particles particulates (95% confidence interval 0.3% - 2.0%) and no detected response to $PM_{2.5}$ of crustal origin. There is thus

limited information that indicates that airborne particles emitted by mobile sources (of which diesels account for a major fraction) are no less potent, and appear likely to be more potent in inducing short term changes in mortality than airborne particles originating from other sources of emission. There is also considerable scientific evidence indicating that diesel emissions increase lung cancer risk [Dawson, S. V., and Alexeef, G. V. (2001) "Multi-stage model estimates of lung cancer risk from exposure to diesel exhaust, based on a U. S. railroad worker cohort," *Risk Analysis* 21(1):1-18; Gerde, P., Muggenburg, B. A., Lundborg, M., and Dahl, A. R. "The rapid alveolar absorption of diesel soot-adsorbed benzo(a)pyrene: bioavailability, metabolism and dosimetry of an inhaled particle-borne carcinogen," *Carcinogenesis* 22:741-749; Larkin, E. K., Smith, T. J., Stayner, L., Rosner, B., Speizer, F. E., and Garshick, E. (2000) "Diesel exhaust exposure and lung cancer: Adjustment for the effect of smoking in a retrospective cohort study," *Am J. Ind. Med.* 38:399-409; Lipsett, M., and Campleman, S. (1999) "Occupational exposure to diesel exhaust and lung cancer: A meta-analysis," *Am J. Public Health* 89:991-993]. Indeed, diesel engine exhaust is listed under California's Proposition 65 as a chemical "known to the state to cause cancer." 22 C.C.R. §12000(b). Other conditions believed to be caused by diesel and other fine particles in the air include interactions with the processes mediating asthma and other respiratory symptoms [Nordenhall, C., Pourazar, J., Ledin, M. C., Levin, J. O., Sandstrom, T., and Adelroth, E. (2001) "Diesel exhaust enhances airway responsiveness in asthmatic subjects," 17(5):909-915; Zemp, E., Elsasser, S., Schindler, C., Kunzli, N., Perruchoud, A.P., Domenighetti, G., Medici, T., Ackermann-Liebrich, U., Leuenberger, P., Monn, C.,

Bolognini, G., Bongard. J.P., Brandli, O., Karrer, W., Keller, R., Schoni, M.H., Tschopp, J.M., Villiger, B., Zellweger, J.P. (1999) "Long-term ambient air pollution and respiratory symptoms in adults (SAPALDIA study). The SAPALDIA Team," *Am. J. Respir. Crit. Care Med.* 159 (4 Pt 1):1257-1266], impairment of lung function [Schindler, C., Kunzli, N., Bongard, J. P., Leuenberger, P., Karrer, W., Rapp, R., Monn, C., and Ackermann-Liebrich, U. (2001) "Short-term variation in air pollution and in average lung function among never- smokers. The Swiss Study on Air Pollution and Lung Diseases in Adults (SAPALDIA)," *Am. J. Respir. Crit. Care Med.* 163 (2):356-361], increases in the blood level of the clotting factor, fibrinogen, [Schwartz, J. (2001) "Air pollution and blood markers of cardiovascular risk," *Environmental Health Perspectives* 109 (suppl 3):405-409], and decreases in the variability of heart rates [Creason, J., Neas, L., Walsh, D., Williams, R., Sheldon, L., Liao, D., and Shy, C. (2001) "Particulate matter and heart rate variability among elderly retirees: the Baltimore 1998 PM study," *J. Expo. Anal. Environ. Epidemiol.* 11(2):116-122; Pope, C. A. 3rd (2000) "What do epidemiologic findings tell us about health effects of environmental aerosols?" *J. Aerosol Med.* 13(4):335-54, Magari, S. R., Hauser, R., Schwartz, J., Williams P. L., Smith, T. J., and Christiani, D. C. (2001) "Association of heart rate variability with occupational and environmental exposure to particulate air pollution," *Circulation* 104(9):986-991]. The three last mentioned effects-lung function decrease, increase in serum fibrinogen, and decreased heart rate variability–tend to reinforce the conclusion that the connection between fine particle exposures and cardiovascular mortality is causal, because each of them has been shown in prospective epidemiological studies to be an

independently predictive risk factor for general cardiovascular mortality [Knuiman, M. W., James, A. L., Divitini, M. L., Ryan, G., Bartholomew, H. C., and Musk, A. W. (1999) "Lung function, respiratory symptoms, and mortality: results from the Busselton Health Study," *Ann. Epidemiol.* 9(5):297-306; Folsom, A. R., Wu, K. K., Rosamond, W. D., Sharrett, A. R., and Chambless, L. E. (1997) "Prospective study of hemostatic factors and incidence of coronary heart disease: the Atherosclerosis Risk in Communities (ARIC) Study," *Circulation* 96(4):1102-1108; Kannel, W. B. (1997) "Influence of fibrinogen on cardiovascular disease," *Drugs* 54 Suppl 3:32-40; Kelleher, C. C. (1992) "Plasma fibrinogen and factor VII as risk factors for cardiovascular disease," *Eur. J. Epidemiol.* 8 Suppl 1:79- 82; Tsuji, H., Venditti, F. J. Jr., Manders, E. S., Evans, J. C., Larson, M. G., Feldman, C. L., and Levy, D. (1994) "Reduced heart rate variability and mortality risk in an elderly cohort. The Framingham Heart Study," *Circulation* 90(2):878-883].

16. In attempting to roughly quantify the health effects of the proposed federal activity, I first needed to know the increases in emissions that can be expected from the increased presence of Mexico-domiciled trucks within the United States. I then translated these increased emission figures into increased exposures of the U.S. population to the fine particulate matter that is emitted as diesel exhaust. I then calculated the additional increment in health problems that can be expected as a result of such increased exposures.

17. With respect to the increases in emissions levels that can be expected to result from the new federal rulemaking, I have performed no independent calculations myself but am instead relying upon the Sierra

Research Report prepared by Dr. Lyons covering expected changes in emissions for the San Diego and Houston areas only. If in future work, the Sierra researchers extend their emissions assessment nationally, it should be expected that the total expected change in emissions and associated health impacts will increase.

18. With respect to the human exposures that are likely to occur from these increased emissions, and the risk calculations assessing the variety of health problems that can be expected from these increase exposures, I am relying for the most part on modest adaptations of the results of a regulatory impact analysis concerning heavy duty diesel engines that was prepared and published in December 2000 by the U.S. Environmental Protection Agency ("EPA"), Office of Transportation and Air Quality, Assessment and Standards Division. EPA's analysis, which is entitled "Regulatory Impact Analysis: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements" (EPA 420-R-00-026). This extensive report was designed to assess the societal impact of requiring certain modifications to heavy duty diesel engine emissions control technology and fuel standards starting in 2007.

19. In the cost/benefit analysis for its 2007 rulemaking, EPA estimates that requiring cleaner diesel engine technology and also requiring the use of low sulfur fuel will reduce the generation of fine particulate matter nationwide by approximately 109,000 tons per year by the time this new generation of diesel engines has completely replaced the old engine fleet (expected to be in the year 2030).

20. EPA also estimates that this reduction in particulate pollution will be associated with approxi-

mately 8,300 fewer premature deaths per year than would otherwise occur. In other words, removing particulate matter from the atmosphere will translate directly into saved lives. EPA makes similar calculations not only for reduced deaths but also for other health impacts such as acute bronchitis in children, chronic bronchitis in adults, hospital admissions for adults over 64 for pneumonia and chronic obstructive pulmonary disease, hospital admissions and emergency room visits for asthma, total asthma attacks, and work loss days and minor restricted activity days for adults age 18-65.

21. Using these same data, through simple multiplication and division I then calculated the changes in morbidity and mortality that could be expected per year per change in tons of particulate matter emitted each year. I then adjusted these rates to account for differences in the expected population of the United States between the present and 2030.

22. After calculating and adjusting these figures, I then converted the change in emissions data estimated in the Sierra Research Report for the San Diego and Houston areas only from tons per day (as in the Report) into tons per year (as per EPA's analysis), and then multiplied these figures by the expected changes in each category (e.g., deaths, bronchitis, pneumonia) per year per change in tons of diesel particles emitted.

C. The Health Risks Posed by Diesel Emissions From Mexico-Domiciled Trucks

23. My conclusions are that the increase in fine particulate matter estimated to result by the year 2007 in the Houston and San Diego areas alone from Mexico-domiciled trucks will translate directly into premature

deaths, increased cases of disease, numerous lost work days and increased health care costs. More particularly, *I would expect an annual impact of dozens of increased deaths, hundreds of additional asthma attacks, thousands of days of lost work, and tens of thousands of days of restricted activity in adults each year as a result of the increased emissions. There would also be several dozen increased cases per year of chronic bronchitis in adults and numerous additional hospital admissions due to pneumonia, cardiovascular problems, chronic obstructive pulmonary disease, and asthma.*

24. Aside from assuming the validity of the emissions changes in the Sierra Research Report, my preliminary numerical results also assume that:

(a) diesel fine particulate emissions have the same potency as PM 2.5. All are very small particles; diesel particulates are smaller than average and penetrate well into the deep lung. EPA made a similar assumption in its 2007 rulemaking analysis; moreover data from Laden et al. (2000), discussed in paragraph B2 above indicate that at least for the acute mortality effects, fine particles originating from mobile sources (including diesel particles) appear, if anything, more potent than fine particles originating from other types of sources (including crustal weathering and coal fired power plants);

(b) the dose/response relationships for the modest percentage changes in ambient fine particle exposures are well approximated by incremental linear relationships [This is reasonable because it is a well known mathematical result that even though a function may be highly nonlinear, it can be approximated by a straight

line over a very limited range of the independent variable (air concentration in this case)];

(c) the transport and exposure patterns produced by emissions from the San Diego and Houston areas are similar to the national patterns of emissions and exposures modeled in EPA's 2007 rulemaking analysis [while this assumption clearly has some potential to introduce inaccuracies in the exposure assessment, because the prevailing winds are from the West to the East in the United States, much of the nation is likely to be down wind of San Diego and Houston most of the time. Therefore, with the long range transport expected for the fine particles emitted by diesel engines, the national ratio of inhalation to emissions from San Diego and Houston would not differ greatly from the typical national pattern used in EPA's 2007 analysis];

(d) the background levels of pollution in 2007 will be similar to those envisioned by EPA in its 2007 rulemaking analysis for the year 2030.

25. Therefore the estimates I have provided above, while a rough approximation, are nevertheless reasonable estimates of the overall health impacts that are likely to result from the increased emissions that are discussed in the Sierra Research Report. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 30th day of April, 2002, at Arlington, Virginia.

/s/ DALE HATTIS, PH.D.
DALE HATTIS, PH.D.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Docket No. C02-2115-CW

PUBLIC CITIZEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, BROTHERHOOD OF TEAMSTERS, AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION, CALIFORNIA TRUCKING ASSOCIATION, AND ENVIRONMENTAL LAW FOUNDATION, PLAINTIFFS

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, JOSEPH M. CLAPP, AND NICHOLAS R. WALSH, DEFENDANTS

DECLARATION OF ALISON K. POLLACK IN SUPPORT OF AMICUS CURIAE MEMORANDUM OF POINTS AND AUTHORITIES

I, ALISON K. POLLACK, declare:

1. I am a Principal at ENVIRON International Corporation ("ENVIRON"), which is well known for its extensive experience in the development and application of emission inventory, photochemical, particulate matter, and visibility air quality models for assessment of ozone and particulate matter issues. I have personal knowledge of the facts set forth herein and if called as a witness, I could and would competently testify thereto.

2. ENVIRON has been retained by the Office of the California Attorney General to serve as a technical consultant for the review and evaluation of the January

16, 2002 Final Programmatic Environmental Assessment ("EA") which has been prepared and issued by defendant Federal Motor Carrier Safety Administration. In this regard, ENVIRON has prepared and submitted to defendants a technical evaluation of defendants' EA.

3. My field of specialization includes extensive technical and managerial experience in the analysis of emissions inventories and models. My primary expertise is in the analysis of on-road and off-road mobile source emissions and emission models, on-road and off-road mobile source control programs, and environmental statistics. I am also nationally recognized for my expertise in the data and analysis methods used to evaluate vehicle emissions test programs and to develop both on-road and off-road mobile source emission factor models. I have served on two National Academy of Sciences (NAS) Committees—Review of EPA's Mobile Source Emissions Factor Model (MOBILE), and Effectiveness of Vehicle Emission Inspection and Maintenance Programs.

4. My educational background includes a B.S. degree in statistics from Princeton University and a M.S. degree in statistics from the University of Wisconsin. I am also a member of the American Statistical Association and have authored and co-authored numerous technical publications concerning mobile-source emissions modeling. A true and correct copy of my resume which further describes my qualifications is attached hereto as Exhibit "A".

5. ENVIRON is a 450-person health and environmental consulting firm with offices throughout the United States and several offices in Europe and Asia. Founded in 1982, ENVIRON has gained a national

reputation as a leader in the areas of environmental strategic analysis, regulatory compliance assurance, environmental and public health risk assessment, and risk management. Our multi-disciplinary staff is comprised of experts in air, water, and soils science and engineering, and includes environmental and chemical engineers, air scientists, hydrogeologists, toxicologists, chemists, industrial hygienists, other environmental and public health scientists, and regulatory and policy experts. ENVIRON's wide array of private and public sector clients includes federal regulatory agencies and policy arms and state and local governments throughout the U.S. as well as some of the nation's largest public and private companies and leading law firms, industrial trade associations, plaintiffs and defendants in toxic tort litigation, real estate developers, and insurance professionals.

6. As a result of the North American Free Trade Agreement (NAFTA), Mexican trucks, which until now have not been allowed to operate within California except within very limited commercial zones, will soon be allowed to drive on California roadways. The purpose of this declaration is to provide for the Court an overview of the environmental impacts of allowing Mexican trucks to operate on California roadways. ENVIRON reviewed the air quality analysis of the environmental impacts of cross-border diesel truck emissions performed in support of the Federal Motor Carrier Safety Administration's (FMCSA's) Finding of No Significant Impact (FONSI) and EA[1], and found

[1] "Finding of No Significant Impact, Safety Oversight for Mexican Domiciled Commercial Motor Carriers; Final Programmatic Environmental Assessment," US Department of Transportation, Federal Motor Carrier Safety Assessment, Prepared by

many shortcomings.[2] A true and correct copy of ENVIRON's technical report, dated April 18, 2002, is attached hereto as Exhibit "B." This document summarizes key findings from that review, and puts them into the context of current and in progress California and federal air quality regulations.

Diesel exhaust emissions pose a health threat to Californians

7. The impact of diesel emissions on air quality in California has been well documented in numerous research studies and identified as a serious health concern by major air pollution control agencies in California. On August 27, 1998, the California Air Resources Board (CARB) identified diesel particulate emissions as a Toxic Air Contaminant (TAC), thus ending a near-decade long investigation into the health effects of exposure to diesel exhaust.[3] The U.S. Environmental Protection Agency will shortly also declare diesel exhaust to be a TAC.[4] An extensive study of localized impacts of diesel and other toxic pollutants was conducted in Southern California during 1998-1999 and found that the contribution to cancer risk is dominated by mobile sources, with more than 70 percent of all risk

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the John A. Volpe National Transportation Systems Center, January, 2002.

[2] ENVIRON, "Review of emissions increases with Mexican heavy-duty diesel trucks operating in California and elsewhere in the U.S.," April 18, 2002.

[3] California Environmental Protection Agency, Air Resource Board Meeting, August 27, 1998, Sacramento, California.

[4] Chris Grundler, Deputy Director, Office of Transportation and Air Quality. Keynote speaker at 12th CRC On-Road Vehicle Emissions Workshop, San Diego, April 16, 2002.

attributed to diesel particulate emissions.[5] Another 20 percent was contributed by other toxics associated with mobile sources.

8. The State of California has the legal authority to adopt regulations to control on- and off-road vehicles and consumer products for criteria pollutants, and mobile and stationary sources for toxic air pollutants. It also has unique authorities under the federal Clean Air Act to adopt emissions standards for mobile sources that are more stringent than the federal controls. The CARB has developed a comprehensive master plan that addresses its control activities under the title "*Clean Air Plan: Strategies For A Healthy Future, 2002-2020.*"[6] The CARB Clean Air Plan (CAP) is currently undergoing public review and may be adopted by the CARB as state policy in mid-summer 2002. When adopted by the CARB's governing board, the CAP will constitute an action plan that will guide CARB's statewide control priorities and activities. The measures in the Clean Air Plan, and their prospective emission reductions and air quality benefits, would later be incorporated in locally developed regional plans, whether the regional plans are developed in response to federal or state Clean Air Act requirements.[7] While the CAP will not be submitted to EPA as a formal

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[5] South Coast Air Quality Management District, "Multiple Air Toxics Exposure Study II (MATES-II)," Diamond Bar, California, March 17, 2000, Section 7.1, finding 3.

[6] California Air Resources Board, Clean Air Plan: Strategies for a Healthy Future 2002-2020, *http://www.arb.ca.gov/planning/caplan/caplan.htm*

[7] Letter from Robert D. Fletcher, Chief, Planning and Technical Support Division, CARB, noticing the May 20-23, 2002 Workshops, page 1, *http://www.arb.ca.gov/planning/caplan/notice.doc*

State Implementation Plan (SIP) update, many of its commitments for additional emission reductions will become a part of the regional SIPs and thus become binding on the affected sources.[8]

9. An important component of the CAP, and of particular interest to the consequences of allowing Mexican trucks to pass through California areas, is the control of emissions from heavy-duty diesel vehicles. The CAP projects that in 2010, 44 percent of the NO_X emissions and 34 percent of the PM10 emissions from all on-road mobile sources will be from heavy-duty diesel vehicles.[9] The CAP proposes seven strategies to reduce emissions from heavy-duty engines and vehicles.[10] They include cleaner truck and bus incentives, community-based vehicle inspections, controlling vapors from gasoline cargo tankers, computerized systems to detect malfunctions and excess emissions, inspection of NO_X emissions from buses and trucks, requiring engine manufactures to test existing buses and trucks, and an extensive retrofit program to clean up the existing bus and truck fleet. The CAP also incorporates the CARB Diesel Risk Reduction Plan (DRRP) that earlier laid out a strategy to reduce emissions from diesel particulate matter.[11] The DRRP includes new regulatory standards for all diesel-fueled engines to reduce diesel PM emissions by 90 percent, retrofit of in-use engines, and the use of low sulfur fuel to provide the quality of diesel fuel needed by the advance diesel

[8] *Ibid.*

[9] California Air Resources Board, Clean Air Plan: Strategies for a Healthy Future 2002-2020, Sacramento, California, March 15, 2002, Pg. II-C-2

[10] *Ibid.*, Pg. II-C-10

[11] *Ibid.*, Pg. I-F-61,

PM emission controls.[12] CARB cannot extend the application of these emissions control measures to the Mexican vehicle fleet.

10. One of the more significant measures proposed in the CAP is a diesel retrofit rule.[13] A retrofit is a device installed on an existing, in-use vehicle to reduce exhaust emissions of one or more pollutants. The suggested rule would effect diesel retrofits for refuse haulers, fuel tanker trucks, public and publicly contracted, on–road, and off-road vehicles. CARB has indicated it will require 85 percent reduction in diesel particulate matter and full implementation of the regulation by 2007. Once again, these controls in the CAP proposal do not apply to Mexican vehicles and this will increase the impact those vehicles have upon air quality in California.

California areas are currently in violation of Federal and State Air Quality Standards

11. Both the United States Environmental Protection Agency (USEPA) and the California Air Resources Board (CARB) set ambient air quality standards applicable to California. USEPA's standards, known as National Ambient Air Quality Standards (NAAQS), are set under authority of the Federal Clean Air Act; CARB sets state standards under authority of the California Health and Safety Code. The list of pollutants for which the Federal and State governments have set standards are slightly different, but both governmental bodies have set standards for ozone

[12] CARB Diesel Risk Reduction Program, http://www.arb.ca.gov/diesel/dieselrrp.htm

[13] *Ibid*, On-road, heavy duty rule 7, Pursue Approaches to Clean Up the Existing Truck and Bus Fleet, Pg. II-C-19.

(O3) and for airborne particulate matter (PM) below a specified size, i.e., with aerodynamic diameter less than 10 μm (PM10). The USEPA reviews air quality monitoring data to identify localities with concentrations of pollutants that exceed the maximum allowable levels specified in the NAAQS. This information is used by the USEPA to define "nonattainment" areas. States such as California that have nonattainment areas are required to submit State Implementation Plans (SIPs) detailing the emission reduction measures they plan to adopt to achieve attainment of each applicable NAAQS by the attainment dates specified in the Clean Air Act. The CARB goes through a similar process for identifying nonattainment areas and air quality management plans must also be developed for these areas. Unlike the federal NAAQS, however, the State ambient air quality standards are not tied to any specific attainment date.

Tables 1 and 2 list, respectively, all current Federally designated ozone (O3) and particulate matter (PM10) nonattainment areas in California along with their nonattainment classifications as of 15 January 2002. Table 3 summarizes attainment/nonattainment status with respect to the California sate air quality standards for ozone (O3) and particulate matter (PM10). There are no specific dates specified in State law or regulations by which attainment must be achieved in areas designated nonattainment. However, the California Clean Air Act requires areas that violate the State standards to endeavor to attain them by the earliest practicable date. Most urban regions do not meet the State ozone standard and virtually all areas violate the existing PM10 standard. To aid attainment efforts, State law directs ARB to reduce emissions from vehicles, fuels and consumer products.

On-road Motor Vehicle Emissions Will Increase Without the TRO

12. If Mexican trucks are permitted to drive on California roadways, emissions from on-road motor vehicles in California will likely increase immediately. This is because emissions from Mexican trucks, on average, are higher than the US fleet. They are higher for two reasons. First, Mexican emissions standards for heavy-duty diesel vehicles were not established until 1993, and so pre-1993 Mexican vehicles will have much higher emissions than pre-1993 California vehicles. Second, the average age of the Mexican diesel line-haul fleet is much older than that in California, and those older vehicles have higher emissions.

Past and Future Emissions Regulations for Mexican Trucks Are Not as Stringent as US Regulations

13. Emissions for Mexican heavy-duty diesel vehicles were not implemented until the 1993 model year. Heavy-duty emissions standards for US trucks were in place for many years prior to 1993. Details of the standards may be found in ENVIRON's 18 April 2002 memorandum. For all model years prior to 1993, Mexican heavy-duty diesel vehicles will thus have higher emissions than US heavy-duty diesel vehicles from the same model year. In other words, a ten-year old Mexican truck will have higher emissions on average than a 10-year old US truck. FMCSA did not acknowledge these emissions standards differences in their air quality analysis.

14. The US has entered in legal agreements with engine manufacturers to retrofit heavy-duty engines to correct a defeat device employed by many manufacturers to circumvent emission regulations. This retrofit

agreement, which will reduce emissions from a portion of the US heavy-duty diesel vehicle fleet, does not apply to Mexican vehicles, thus resulting in higher per vehicle emissions for Mexican line-haul trucks compared with California or other US trucks. FMCSA did not acknowledge the emissions reductions from these retrofits that will be seen in US but not Mexican heavy-duty diesel vehicles.

15. FMCSA also did not acknowledge current differences between Mexican and California diesel fuel. California diesel fuel has additional requirements beyond federally mandated US diesel fuel, and the California diesel fuel has been shown in testing to produce lower NO_X and PM emissions in test engines.[14] Mexican trucks will have higher PM and NO_X emissions with the use of diesel fuels purchased outside California but consumed within California.

16. FMCSA performed their air quality analysis on the current fleet only. There are likely to be even larger emissions increases in future years. The US EPA has promulgated very strict NO_X and PM emissions standards for heavy-duty diesel vehicles beginning with the 2007 model year. These 2007 emissions standards are a factor of 20 times lower than the current standards for NO_X and a factor of ten times lower than current standards for PM_{10}. In addition, the 2007 regulations require diesel fuel sulfur levels to be significantly lower than current diesel fuel sulfur levels to enable emission control technologies to meet the future engine exhaust standards. We are not aware of any

[14] The ENVIRON April 18, 2002 memorandum cites the emissions benefits of California diesel fuel that are assumed by CARB in their EMFAC2001 on-road vehicle emissions model.

plans for Mexico to adopt either the more stringent US 2007 emissions standards or the low sulfur diesel fuel regulations, and so PM and NO_X emissions from future Mexican trucks will be significantly higher than US trucks in future years. In addition, California heavy-duty diesel vehicles that refuel in Mexico and return to operate within California may unintentionally compromise their emission control devices.

Mexican Heavy-Duty Diesel Trucks Are Older on Average Than US Heavy-Duty Diesel Trucks

17. Because of differences in emissions standards, the age of the Mexican truck fleet compared to the age of the California truck fleet is of paramount importance, as older vehicles on average have higher emissions. What is important in terms of emissions estimates is not just the average age of the fleet, but also how many miles on average each vehicle drives annually. The combination of vehicle age and number of miles driven per year as a function of vehicle age is referred to as the travel fraction. Figure 1 compares the California and Mexican truck travel fractions for so-called heavy-heavy-duty diesel vehicles, those trucks with gross vehicle weight rating of more than 60,000 pounds that constitute most of the line-haul trucking. These travel fractions are derived from the models that have been developed to estimate California on-road vehicle emissions (EMFAC2001, developed by CARB) and Mexican on-road vehicle emissions (MOBILE5-Mexico, a Mexican version of EPA's MOBILE5 on-road vehicle emission factor model.[15]) The travel fraction for a given age is

[15] "Mexico Emissions Inventory Program Manuals, Volume VI, Motor Vehicle Inventory Development," Radian International, May 17, 1996.

the fraction of total annual miles driven for the vehicle class.[16] For example, Figure 1 shows that one-year-old trucks in aggregate constitute about eight percent of the California heavy-heavy-duty diesel vehicles (HHDDV), but only about one percent of the Mexican HHDDV. Overall the figure shows that a far greater proportion of annual trucking miles are driven by older Mexican trucks than by older Californian trucks. Calculations using the travel fractions shown in Figure 1 show that in the Mexican HHDDV fleet, almost 80 percent of the miles are driven by trucks 10 years old or older; since Mexican diesel trucks were not regulated until 1993, these trucks in the current fleet are all uncontrolled. In the Californian HHDDV fleet, only about 45 percent of the miles are driven by HHDDV ten years or older.

[16] ENVIRON's April 18,2002 memorandum describes vehicle age distributions, which are part of the travel fraction distribution. The memorandum stated that CARB EMFAC2001 documentation says that they assumed that the age distributions for California and Mexican trucks are the same in EMFAC2001, but that we found different age distributions in the source code. Since that time, we have learned from CARB staff that CARB indeed assumed that the age distributions were the same at the time the model was developed because they did not have access to Mexican diesel fleet age distributions. Numerical differences now in the model source code are an artifact of updating California county age distributions but leaving the Mexican truck age distributions unchanged from the earliest version of EMFAC2001.

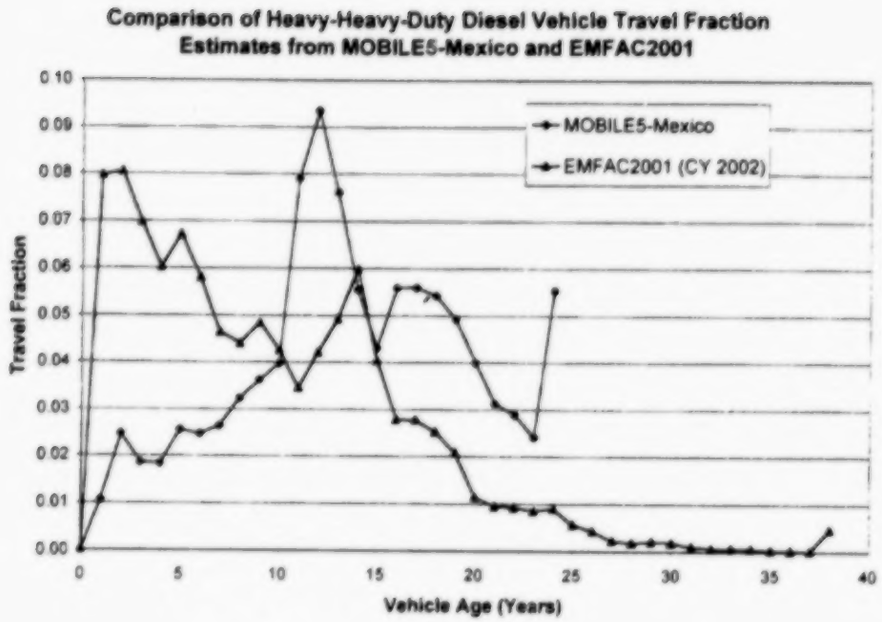

Figure 1. Travel fractions for California heavy-heavy-duty diesel vehicles (HHDDV) from CARB EMFAC2001 model compared to Mexican HHDDV from M5-Mexico model.

Travel on California Roadways by the Older Mexican Fleet with Less Stringent Emissions Regulations Will Immediately Increase On-road Vehicle Emissions in California, and Will Also Increase Emissions in the Future

18. The combination of the two factors discussed above—less stringent Mexican emissions standards and an older Mexican fleet—will very likely result in an immediate increase in emissions in California when the

Mexican trucks are permitted to drive past the border areas. We do not have sufficient time at this point to perform a detailed analysis, but the immediate emissions increase in each California ozone and PM nonattainment area (or county) can be estimated using CARB's EMFAC2001 model, the Mexican HHDDV travel fractions from the MOBILE5-Mexico model, and other available sources of information. Future year emissions increases can also be estimated using these models. Without Mexican adoption of the very stringent US EPA 2007 heavy-duty diesel emissions standards and diesel fuel sulfur regulations, the disparity between US and Mexican fleet emissions will increase over time in future years.

19. Critical to the estimation of emissions increases with Mexican trucks driving on California roadways is the estimate of the number of Mexican trucks that will cross the border and continue to drive through California on state roads. The US Customs Service reported slightly more than one million trucks crossing the border from Mexico into California in fiscal year 2001, of which the majority are Mexican trucks.[17] It is not yet clear what fraction of these Mexican trucks will drive past the border zone on California roadways, but even a very small fraction will likely cause an immediate emissions increase because of the significant differences in emissions standards and vehicle fleet ages.

[17] United States General Accounting Office, "North American Free Trade Agreement Coordinated Operation Plan Needed to Ensure Mexican Trucks' Compliance with U.S. Standards," GAO-02-238, December 2001, p. 5.

Table 1. Federal nonattainment classifications and attainment dates for areas in California designated nonattainment for ozone (O3). (Source: *http://www.epa.gov/oar/oaqps/greenbk*).

Area	Counties[18]
Chico	Butte
Eastern Kern County	Kern (P)
Imperial County	Imperial
Los Angeles South Coast Air Basin	Los Angeles (P), Orange, Riverside (P), San Bernardino (P)
Sacramento Metro	El Dorado (P), Placer (P), Sacramento, Solano (P), Sutter (P), Yolo
San Francisco Bay Area	Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano (P), Sonoma (P)
San Joaquin Valley	Fresno, Kern (P), Kings, Madera, Merced, San Joaquin, Stanislaus, Tulare
Santa Barbara-Santa Maria-Lompoc	Santa Barbara
Southeast Desert Modified AQMA	Los Angeles (P), Riverside (P), San Bernardino (P)
Ventura County	Ventura
Yuba City	Sutter (P), Yuba

[18] (P) Indicates only a portion of the county is included within the area boundaries

O3 Classification[19]	O3 Attainment Date
Transitional (185a)	Appears to have attained in 2000
Serious	11-15-2001
Transitional (185a)	Nonattainment
Extreme	11-15-2010
Severe-15	11-15-2005
Other	11-15-2000 (200620)
Severe-15	11-15-2005
Serious	11-15-1999 (Attains, but not yet redesignated)
Severe-17	11-15-2007
Severe-15	11-15-2005
Transitional (185a)	Attains, but not yet re-designated

[19] Areas listed as "Transitional (185a)" were designated as an ozone nonattainment area as of the date of enactment of the Clean Air Act Amendments of 1990 but have not violated the national primary ambient air quality standard for ozone for the 36-month period commencing on January 1, 1987, and ending on December 31, 1989. Twelve areas were classified transitional in 1991. (See section 185A of the Clean Air Act.)

Table 2. Federal nonattainment classifications and attainment dates for areas in California designated nonattainment for particulate matter (PM_{10}). (Source: *http://www.epa.gov/oar/oaqps/greenbk*).

Area	Counties[20]
Coachella Valley	Riverside (P)
Imperial Valley	Imperial (P)
Los Angeles South Coast Air Basin	Los Angeles (P), Orange, Riverside (P), San Bernardino (P)
Mono Basin	Mono (P)
Owens Valley	Inyo (P)
Sacramento	Sacramento
San Bernardino	San Bernardino (P)
San Joaquin Valley	Fresno(P), Kern (P), Kings (P), Madera (P), San Joaquin (P), Stanislaus (P), Tulare (P)
Searles Valley	Inyo (P), Kern (P), San Bernardino (P)

[20] (P) Indicates only a portion of the county is included within the area boundaries

PM_{10} Classification	PM_{10} Attainment Date
Nonattainment (Serious)	12-31-2000 [21]
Nonattainment (Moderate)	12-31-1995[22]
Nonattainment (Serious)	12-31-2000
Nonattainment (Moderate)	Redesignation pending
Nonattainment (Serious)	12-31-2006
Nonattainment (Moderate)	Redesignation pending
Nonattainment (Moderate)	Redesignation pending
Nonattainment (Serious)	12-31-2001[23]
Nonattainment (Moderate)	12-31-95[24]

[21] Redesignation pending, but recently has shown new violations

[22] Attainment under 179B(d) of CAA ("but, for" clause)

[23] San Joaquin Valley failed to submit SIP, and EPA mandated new SIP by 12-31-2002

[24] On June 5, 2001, EPA proposed splitting Searles Valley into three separate NAAs–Trona, Coso Junction, and Indian Wells Valley. Trona attained by 12-31-1994; Coso Junction and Indian Wells Valley are reclassified as Serious. No final action yet by EPA nor new attainment deadlines.

Table 3. Status of California Air basins with respect to the state ambient air quality standards for ozone (O3) and particulate matter (PM_{10}). Source: *http://www.arb.ca.gov/desig/adm/adm.htm*.

Air Basin	Counties[1]
San Diego	San Diego
South Coast	Los Angeles (P), Orange, Riverside (P), San Bernardino (P)
Mojave Desert	San Bernardino (P), Riverside (P), Kern (P), Los Angeles (P)
Salton Sea	Imperial, Riverside (P)
South Central Coast	Ventura, Santa Barbara, San Louis Obispo (P)
Great Basin Valleys (Except Mono Co.)	Inyo, Alpine
Great Basin Valleys (Except Alpine and Inyo counties)	Mono
San Joaquin Valley	San Joaquin, Stanislaus,Merced, Fresno, Kings, Tulare, Kern (P), Madera
North Central Coast	Monterey, San Benito, Santa Cruz
San Francisco Bay	Marin, Napa, Sonoma (P), San Francisco, San Mateo, Santa Clara, Alameda, Contra Costa, Solano (P)
Lake Tahoe	El Dorado (P), Placer (P)
Mountain Counties (except Sierra and Plumas Counties)	Mariposa, Tuolumne, Calaveras, Amador, El Dorado, Placer, Nevada
Mountain Counties (Sierra and Plumas counties)	Sierra and Plumas

Sacramento Valley	Shasta, Tehama, Glenn, Butte, Colusa, Yuba, Sutter, Sacramento, Yolo, Solano (P)
Lake County	Lake
North Coast	Del Norte, Humboldt, Trinity, Mendocino, Sonoma (P)
Northeast Plateau	Modoc, Siskiyou, Lassen

O3 Status	**PM_{10} Status**
Nonattainment	Nonattainment
Nonattainment	Nonattainment
Nonattainment	Nonattainment
Nonattainment	Nonattainment
Nonattainment	Nonattainment
Unclassified	Nonattainment
Nonattainment	Nonattainment
Nonattainment	Nonattainment
Attainment	Nonattainment
Nonattainment	Nonattainment
Attainment	Nonattainment
Nonattainment	Nonattainment[25]
Unclassified	Nonattainment
Nonattainment[26]	Nonattainment
Attainment	Attainment
Attainment	Nonattainment
Attainment	Nonattainment

[25] Mariposa, Tuolomne, and Amador counties are designated "unclassified"

[26] Colusa county is classified as "nonattainment-transitional".

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on May 1, 2002, in San Francisco, California.

/s/ ALISON K. POLLACK
ALISON K. POLLACK

[Seal] **Air Resources Board** [Seal]

Alan C. Lloyd, Ph.D
Chairman

1001 _ Street * P.O. Box 2815 * Sacramento, California 95812 8 * www.arb.ia.gov

SENT VIA: E-MAIL:ED.OCHOA@doj.ca.gov.FAX to 8/19/645-2012 and U.S.P.S.

May 20, 2002

Mr. Ed Ochoa
Deputy Attorney General
Department of Justice
110 West A Street, Suite 1100
P.O. Box 85268
San Diego, CA 91816-5266

Re: Docket Nos. FMCSA 98-3298; 98-3299; and 2001-11060

Dear Mr. Ochoa:

The following information is provided in reference to the above-captioned docket numbers. This information provides clarification regarding a few points concerning the Air Resources Board's (ARB's) Heavy-Duty Vehicle Inspection Program (HDVIP), and particularly how it relates to Mexican registered vehicles traveling into California at the California-Mexican (CA-MX) border crossings.

The ARB administers the HDVIP throughout the state at California Highway Patrol (CHP) weigh stations, ports of entry, fleets and at random roadside locations. We currently maintain full-time inspection operations at the CA-MX border entry sites of Otay Mesa and Calexico as required by SB 270 (Peace) of 1998. Under this program, heavy-duty diesel vehicles are inspected for tampering, and undergo a smoke emissions opacity

test. Owners of vehicles that exceed the specified limits (55% opacity for pre-1991 model year engines and 40% for 1991 and later model year engines) and/or exhibit signs of emission control systems tampering, are issued a citation, are required to bring their vehicles into compliance within 45 days and pay a civil penalty ranging from $300 to $1800. All vehicles travelling on California highways are subject to this program, including vehicles based in other states and in foreign counties.

It is important to note that the smoke emission opacity tests performed under the HDVIP are not traditional "smog checks", such as those that are performed on passenger vehicles within California. A "smog check" test evaluates the chemical components of a vehicle's exhaust, while the HDVIP test simply measures the opacity of the exhaust emitted from the heavy-duty diesel vehicle's stack and includes a visual inspection of the emission control system to detect tampering. For more information on this program, please visit our web page at: www.arb.ca.gov/enf/enf.htm.

Commercial motor carriers from Mexico that fail either the opacity test or the tampering inspection are issued a citation, but are still allowed to enter California under existing law and its restrictions. The ARB enforcement staff provides follow up actions to make sure that the citation is cleared and that the vehicle is brought into compliance. For violators that fail to comply and clear their citations, the ARB can request that the CHP remove the vehicle from service.

While we would prefer to test every vehicle entering at these border sites that exhibits questionable levels of smoke emissions, we do not currently have the staff resources available to perform this level of service. As such, our inspectors perform a visual assessment of the emissions from the incoming vehicles, and complete

inspections on as many of the most offensive violators as possible.

With regard to your question as to whether or not all heavy-duty diesel vehicles are inspected for United States Environmental Protection Agency (U.S. EPA) emissions certification, they are not. If a vehicle owner applies for dual registration (CA-MX), and that vehicle has fewer than 7,500 miles (which, under California law classifies the vehicle as "new"), the emissions label is inspected by the DMV and the engine must meet California or 50-State U.S. EPA emissions standards. Similarly, those vehicles that are inspected under the ARB's HDVIP, are subject to an emissions label inspection.

I hope that this provides sufficient information to answer your questions. Please don't hesitate to contact me if you need further assistance. I may be reached at (916) 322-7061, or via e-mail at pjacobs@arb.ca.gov, or you may contact Ms. Elizabeth F. Miller of my staff at (916) 323-8541 or efmiller@arb.ca.gov.

Sincerely,

Paul E. Jacobs, Acting Chief
Enforcement Division

cc: Ms. Kathleen Walsh,
General Counsel
Air Resources Board

Ms. Mary Hackenbracht,
Senior Assistant Attorney General
Department of Justice
1515 Clay Street
Oakland, CA 94612-1413

LAW OFFICES OF
CHARLES STEVENS CRANDALL
Railroad Square
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CHARLES STEVENS CRANDALL*
*ALSO ADMITTED IN NEW JERSEY

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May 20, 2002

Sent via Facsimile
FMCSA-2001-11060-21

U.S. Department of Transportation
Docket Management Facility, Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Re: Docket No. FMCSA-2001-11060; Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, Interim Final Rule; Request for Comments, 67 Fed. Reg. 12,776 (March 19, 2002)

Re: Docket No. NHTSA-02-11592; Notice 1, Record Keeping and Record Retention, Notice of Proposed Rule Making (NPRM), 67 Fed. Reg. 12,800 (March 19, 2002)

Re: Docket No. NHTSA-02-11593; Notice 1, Importation of Commercial Motor Vehicles, Notice of Proposed Rule Making (NPRM), 67 Fed. Reg. 12,806 (March 19, 2002)

On behalf of Public Citizen, the Environmental Law Foundation ("ELF"), California Labor Federation ("Cal Labor Fed"), International Brotherhood of Teamsters ("Teamsters"), Brotherhood of Teamsters, Auto and Truck Drivers Local 70 ("Local 70"), and California

Truck Association ("CTA"), we submit the following comments on the above-listed interim final and proposed rules.

* * * * *

We are especially concerned that the DOT's EA failed to consider and discuss the potential impacts resulting from important differences that exist between regulatory oversight of diesel engines in the United States and Mexico. For example, the major manufacturers of heavy-duty diesel engines for sale in the United States are subject to federal court consent decrees requiring the retrofitting of those engines with pollution control equipment and other measures designed to reduce pollution. We have previously submitted (via overnight mail delivery of May 17, 2002) one of these consent decrees, *United States of America v. Caterpillar, Inc.*, Civil Action 98-02544 and supporting appendices, filed July 1, 1999. The other consent decrees are available online at "http://es.epa.gov/oeca/ ore/aed/disel/condec. html." We ask that all of these consent decrees be made part of the record of decision.

There are at least two important issues regarding these consent decrees that were neither mentioned nor analyzed in the FMCA's EA. First, there is nothing in the record indicating that these consent decrees apply to diesel engines manufactured for sale or distribution in Mexico. The applicable Mexican official Norms make no mention whatsoever of these decrees. Second, the two major manufacturers of diesels in Mexico, Kenworth of Mexico, S.A. de C.V., and Mercedes Benz of Mexico, are not signatories to the consent decree. Certainly the EA should have analyzed these important regulatory distinctions in terms of the likely emissions differences that will result.

The EA also assumed that comparable emissions would result from Mexico-domiciled and U.S. domiciled trucks without considering whether there are any practical limitations or reasonable enforcement measures in place to ensure compliance with U.S. manufacturing standards. There are certainly practical limitations. For the upcoming and very stringent diesel emissions standards applicable in 2004 and 2007, the use of after treatment control devices by heavy-duty diesel engines will require the use of very low sulfur levels. Fuels containing in excess of 15 ppm will reduce the effectiveness of the after treatment devices and may in some cases permanently damage them. The EA had no basis to assume that very low sulfur fuels will be required or available in Mexico when the more stringent U.S. regulations come into force.

With respect to the use of enforcement measures, currently such enforcement is primarily delegated to the States. *See* GAO Report at 12, 18 (with regard to emissions inspections, U.S. EPA relies on states to establish and enforce their own enforcement procedures). For example, the State of Texas has no pollution testing whatsoever whereas the State of California has only a modest "on road" opacity emissions testing program in place. That program in no way is designed to examine whether individual truck engines meet U.S. regulatory requirements at the time of their manufacture. Indeed, such a program would be extremely costly and might be entirely impractical. In any event, the consequences of such a program, whether as an impact or feasible mitigation measure, should have been examined in the EA and was not.

* * * * *

02-70896 & 02-71249

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC CITIZEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, BROTHERHOOD OF TEAMSTERS AUTO & TRUCK DRIVERS LOCAL 70, CALIFORNIA LABOR FEDERATION, CALIFORNIA TRUCKING ASSOCIATION, AND ENVIRONMENTAL LAW FOUNDATION,
PETITIONERS
AND
NATURAL RESOURCES DEFENSE COUNCIL AND PLANNING AND CONSERVATION LEAGUE,
INTERVENORS

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, JOSEPH M. CLAPP, AND NICOHOLAS R. WALSH, RESPONDENTS

ON PETITION FOR REVIEW OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

BRIEF FOR THE RESPONDENTS

* * * * *

II. THE FMCSA'S FINDING OF NO SIGNIFICANT IMPACT UNDER NEPA WAS REASONABLE

Assuming, *arguendo*, that the Petitioners have standing to challenge the FMCSA's rulemaking, their claims must be rejected on the merits. To begin with, as to NEPA, the Petitioners have not demonstrated (and cannot demonstrate) that the FMCSA's environ-

mental analysis of the Application and Safety-Monitoring Rules was inadequate, or that the agency's finging of no significant impact was arbitrary and capricious.

A. The Safety Rules for Mexican Carriers, By Themselves, Will Not Significantly Impact the Environment

The Petitioners do not assert that the Application and Safety-Monitoring rules, standing alone, will or may have a significant impact on the environment. Nor do they challenge the general methodology by which the FMCSA evaluated the impacts of the rules by themselves. As described above, (pp. 25-32), the EA determined that the rules could effect air emissions in the United States: (1) by influencing the number of Mexican CMVs that will operate in the United States, and (2) by increasing inspections of Mexican CMVs. The EA concluded, however, that the rules would actually reduce the number of Mexican CMVs that will operate in the United States when compared to taking no action, (ER at 94), and that increased emissions from added vehicle inspections would be de minimis, because additional engine operating time would be a tiny fraction of overall operating time in the United States. ER at 98. The Petitioners do not challenge either conclusion.

Instead, the Petitioners contend (*Pet. Br.* At 17) that the FMCSA failed to adequately analyze alleged "connected" effects "unlocked" by the agency's rulemaking; namely, effects that may result from a Presidential decision to modify the trade moratorium. In so arguing, the Petitioners misapply CEQ guidelines as to the proper scope of NEPA analysis and accuse the FMCSA of failing to perform tasks that were not required.

B. The FMCSA Properly Limited Its NEPA Review to Its Own Rulemaking

As Petitioners note (*Pet. Br.* At 14, 18-20), federal agencies may not look to their actions in isolation when assessing impacts under NEPA. Rather, the CEQ regulations require agencies to consider actions "connected" to the actions in question, and also "indirect" and "cumulative" effects. *See* 40 C.F.R. §§ 1508.25 (defining proper "scope" of analysis); *see also* 40 C.F.R. §§ 1508.7 (defining "cumulative" impacts); 1508.8 (defining "effects"); *and* 1508.27(b)(7) (defining "significance"); *see also Kern v. United States Bureau of Land Management*, 284 F. 3d 1062, 1070 (9th Cir. 2002). Nonetheless, a determination of the appropriate "scope" of NEPA analysis is a matter "properly left to their formed discretion" of the agencies and will be overturned only if arbitrary and capricious. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *see also Churchill County*, 276 F.3d at 1075. Here, the FMCSA did not abuse its discretion in limiting its NEPA review primarily to the effects of its combined rulemaking.

1. The FMSCA Did Not Violate CEQ Regulations

Contrary to Petitioners' assertion (*Pet. Br.* at 19), the safety rules issued by the FMCSA and the President's decision on the trade moratorium do not fall into the categories of actions that "should be discussed in the same impact statement" under CEQ regulations. *See* 40 C.F.R. § 1508.25(a)(1). Such "connected" actions are defined as actions: (1) that "automatically trigger other actions," (2) that "cannot or will not proceed unless other actions are taken previously or simultaneously," or (3) that "are interdependent parts of a larger action and depend on the larger action for their justification." *See also Western Radio Services Co., Inc. v Glickman*,

123 F.3d 1189, 1195 (9th Cir. 1997) (applying definitions).

None of these definitions apply to the present case. First, the FMCSA's rulemaking did not (and will not) "automatically trigger" a Presidential decision on the moratorium. By statute' and such decision may be based on a variety of factors relating to trade and transportation policy, *see* 49 U.S.C. § 13902(C)(3), of which motor-carrier safety is but one component. Second, although the safety rules were issued in anticipation of the President's modification of the moratorium, Presidential action was not necessary for the rulemaking to "proceed." Finally, while the Application and Safety-Monitoring Rules depend (to a large degree) on a modification of the moratorium for their justification, the rules cannot be deemed an "interdependent" part of the President's action. While the President will surely look to safety issues when making any determination on the moratorium, the President's decision is not dependent on the challenged rules being in place. Further, as illustrated in the EA, the effects of the safety rules themselves (upon a relaxation of trade restrictions) are easily segregated from the broader effects of modifying the trade moratorium.

For similar reasons, the impacts of modifying the trade moratorium cannot be seen to be "indirect" or "cumulative" effects of the FMCSA's rulemaking. "Indirect" effects are effects "later in time" or "farther removed in distance," but still "caused by" an action. *See* 40 C.F.R. § 1508.8. While in the FMCSA's rulemaking and a modification of the moratorium are interrelated, the President's discretionary action on the moratorium—the condition precedent to the alleged

adverse environmental effects—cannot be said to be "caused by" such rulemaking.

Finally, "cumulative" impacts are defined as "*incremental* impacts" of agency action when added to "other past, present, and reasonably foreseeable actions." *See* 40 C.F.R. § 1508.7 (emphasis added). For example, a project divided into "component parts" with "individually insignificant" impacts may have "cumulative" significance when the parts are added together. *See* 40 C.F.R. § 1598.27(b)(7). Here, the Petitioners do not contend that the safety rules have "incremental" impacts that are "cumulatively significant" when combined with the impacts of modifying the moratorium. Rather, Petitioners allege that the anticipated modification of the moratorium will have significant impacts whether or not the safety rules and their individual impacts (*e.g*, emissions from increased inspections) are in place. Properly considered, such impacts are not "cumulative," but are impacts of the moratorium modification alone.

2. *The FMCSA Properly Limited Its NEPA Review To Matters Within Its Control*

An agency's determination of the scope of its environmental analysis—as with other discretionary decisions under NEPA—must be guided by the purpose of the statue. Because the principal purpose of NEPA is to "inject environmental considerations into the . . . decisionmaking process" of federal agencies, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, *454* U.S. 139, 143 (1981), this Court has consistently recognized the NEPA obligations do not apply where an agency lacks decisionmaking discretion. *See Marbled Murrelet v. Babbitt*, 111 F.3d 1447, 1449-50

(9thy Cir. 1997); *Sierra Club v. Babbitt* 65 F,3d 1502m 1512-13 (9th Cir. 1995); *see also Citizens Against Rails-to-Trails ("CART") v. Surface Transportation Board*, 267 F.3d 1144, 1151 (D.C. Cir. 2001). As stated by the D.C. Circuit, when "the information that NEPA provides can have no affect on the agency's actions, . . . NEPA is inapplicable." *See CART*, 267 F.3d at 1151.

As noted above, the FMCSA's discretion in the present case does not extend to matters of international trade. While the agency has discretion ot determine the scope and extent of *safety* requirements for Mexican carriers (subject to the limitations imposed by Congress in Section 350 of the 2002 DOT Appropriations Act), the agency does not have discretion to bar Mexican carriers from U.S. markets for reasons relating to trade policy or the environmental consequences of trade policy. *See* 49 C.F.R. §§ 13902(a) & 31144(a). Thus, even if the further environmental review urged by Petitioners demonstrated that a modification of the trade moratorium would have significant impacts on air quality in various regions of the United States—a matter the Respondents dispute (*see* pp. 28-30, above) —such information could have no bearing on the FMCSA's decisions with respect to regulating the safety of Mexican carriers. Because the analysis requested by Petitioners would not be pertinent to the FMCSA's rulemaking, it simply cannot be said that the FMCSA acted arbitrarily and capriciously in not performing such analysis.

C. The Specific Objections Raised By Petitioners Lack Merit

Given the above, it is evident that the numerous specific allegations in the smorgasbord of complaints raised by Petitioners, Intervenors, and Amicus lack merit. These allegations: (1) exaggerate the probable impacts of modifying the trade moratorium, and (2) erroneously assert that the FMCSA was required to study such exaggerated impacts.

1. Petitioners Exaggerate Emissions Increases That Could Occur From A Modification of the Moratorium

A modification of the trade moratorium can lead to increases in air emissions in the United States only if: (a) there is a boost in overall truck traffic (rather than simply a shift from U.S. to Mexican carriers); or (b) there is a shift to Mexican carriers and the trucks operated by such carriers have significantly higher emissions than U.S.-domiciled trucks. Although there are reasons to believe such changes might occur, the Petitioners exaggerate the extent of such changes.

First, while NAFTA has significantly boosted cross-border trade by eliminating tariffs and other restrictions on imports from Mexico, (ER at 310-11), this does not mean, as Petitioners' suggest (*Pet. Br.* at 29-30) that a modification of the moratorium on cross-border trucking will necessarily produce a similarly dramatic increase in trade volume. In particular, while a modification of the moratorium on trucking will certainly allow Mexican carriers to transport Mexican goods further into the United States, (as opposed to transferring such goods to U.S. carriers within the border zones, SER at 14), there need not be any significant increase in the

amount of Mexican goods being transported. Absent a significant increase in the volume of trade, overall truck traffic (miles driven by U.S. and Mexican carriers combined) will remain constant.

Similarly, Petitioners overstate the increase in the number of Mexican trucks that will be operated in the United States. While the EA estimated that there could be up to 34,000 Mexican trucks operating in the United States beyond U.S. border zones in the first year following a modification of the trade moratorium, (ER at 46) this number does not represent the overall number of Mexican trucks that will be added to U.S. highways, as Petitioners suggest (*Pet. Br.* at 32). Rather, the EA estimated that the vast majority of these 34,000 trucks will be trucks that are already operating in the United States in the border zones. ER at 45-46.

Finally, the Petitioners overstate the impact of differences in U.S. and Mexican emissions standards. The Clean Air Act addresses motor-vehicle emissions through manufacturing standards applicable to vehicles and engine classes. To enforce these standards, the Act makes it unlawful for any manufacturer to sell, offer for sale, or otherwise introduce into commerce—or for any person to import into the United States—any vehicle or engine unless the EPA has certified that the vehicle or engine class complies with applicable standards issued by the EPA. See 42 U.S.C. § 7522(a). The EPA's initial emissions standards for heavy duty diesel engines ("HDDEs") became effective in 1988. The EPA has subsequently revised these standards on several occasions. *See e.g.*, 40 C.F.R. §§ 86.091-11 (standards for 1991 and after); 86.094-11 (current standard for PM-10, effective in 1994); 86.098-11 (current standard for NO_x, effective in 1998). The EPA's most recent revisions will

tighten NO_x and PM standards in both 2004 and 2007. *See* 40 C.F.R. §§ 86.004-11; 86.007-11.

In 1993, Mexico adopted emissions standards for HDDEs identical to the current U.S. standards. ER at 280. These standards ensure basic equivalency between Mexican and U.S. trucks for model years 1993 through 2002.[9] *Ibid.* Nevertheless, because Mexico did not have standards before 1993, and because the average age of Mexican trucks is greater than that of U.S. trucks, Petitioners assert, (Pet. Br. at 33-34), that emissions from Mexican trucks are likely to be greater, on average, than emissions from United States trucks.

Assuming the Petitioners are correct, there are reasons to believe that any differences in emissions between U.S. trucks and Mexican trucks operating in the United States will not be as great as Petitioners predict. First, the heightened standards put into place by the challenged safety rules will tend to restrict the number of older (pre-1993) Mexican trucks that can be operated in the United States. Second, the generally older trucks currently used by Mexican carriers for short-haul operations into the border zones cannot be taken as an indicator for the condition of Mexican long-haul trucks. SER at 14. Third, there are mechanisms under NAFTA that encourage cooperation between Mexico and the U.S. on the development of equivalent environmental standards. Among other things, the parties to NAFTA negotiated a side agreement on

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[9] Manufactures of HDDEs sold in the United States agreed to meet 2004 standards on an advanced deadline—i.e., by Ocotober 2002—as part of a consent decree to settle an enforcement action than charged the manufacturers with employing "defeat devices" that caused on-road emissions to be higher than emissions during compliance tests. EA 295, 380.

environmental cooperation that created a trilateral commission to address various environmental laws and standards. *See* 19 U.S.C. § 3472 (NAFTA Implementation Act); *see also* Executive Order No. 12915, 59 Fed. Reg. 25775 (May 13, 1994) (order on implementation of North American Agreement on Environmental Cooperation). Finally, whether or not Mexico revises its domestic standards to stay in line with the scheduled tightening of U.S. standards in 2004 and 2007, trucks operated by Mexican carriers in the United States could be subject to the U.S. Clean Air Act standards, depending on the circumstances of their operation.[10]

2. The Petitioners' Complaints Go Beyond the Scope of the FMCSA's NEPA Analysis

Even if the Petitioners' broad predictions about the effects of Presidential action on the trade moratorium have merit, the specific objections levied by petitioners against the FMCS's NEPA analysis do not. As explained above, (p. 49), if the challenged safety rules do cause an increase in emissions, the increase will be limited to emissions from added safety inspections that were not required under pre-existing rules. Petitioners have not identified any flaw in the FMCSA's analysis of these inspection- related emissions.

While the Petitioners assert (*Pet. Br.* at 32-35) that the FMCSA committed fundamental errors in estimating emissions, the Petitioners' objections are unfounded. The EA estimated emissions by using data from EPA emissions models for U.S. trucks. ER at 130.

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[10] Mexican carriers engaged in cross-border operations into the United States may be subject to the prohibition on "importing" vehicles into the United States without a certificate of conformity. *See* 42 U.S.C. § 7522(a).

In manipulating such data to represent emissions from the inspection of Mexican trucks under the challenged rules, the EA reasonably assumed that one third of the Mexican trucks would have emissions comparable to trucks manufactured in the United States in 1994, while the remaining Mexican trucks would have emissions comparable to U.S. trucks manufactured in 1986. *Ibid.*

Petitioners assert (*Pet. Br.* at 33-34) that these assumptions are unreasonable because they misrepresent the age distribution of Mexican trucks and fail to account for emissions differences between Mexican and U.S. trucks. However, neither complaint survives scrutiny. As to age distribution, the Petitioners rely on reports estimating that 10 to 20 percent of trucks operated in Mexico (as opposed to one third) were manufactured in 1994 or after. *See Pet. Br.* at 34 (citing ER at 293, 314). These estimates differ little from the EA estimate and do not account for changes in age distribution of the cross-border fleet that could be prompted by the enhanced safety rules. As to emissions equivalency, the FMCSA had good reason to believe that the EPA models would reasonable approximate emissions from Mexican trucks. For the estimated one-third of Mexican trucks manufactured in 1994 or after, the emissions standards in both countries were the same. ER at 280. For the remaining trucks, the EA used emissions data from a model year (1986) when *neither* the United States or Mexico had significant emissions controls for HDDEs in place. Consequently, although the EA recognized that EPA emissions models "may not be applicable to Mexican vehicles," (ER at 131) it was not arbitrary for the EA to conclude that conservative assumptions otherwise built into the estimate

would "override" any deficiencies in the emissions models. *Ibid.*

Further, any alleged errors in the FMCSA's estimate of inspection-related emissions must be viewed in context. Because inspection-related emissions are such a tiny fraction of overall emissions from Mexican carriers and an even smaller fraction of emissions from commercial motor carriers in general, (*see* p. 32, above) absolute precision in quantifying this fraction was not required.

Indeed, for the same or similar reasons, all of the remaining NEPA objections raised by Petitioners, Intervenors, and Amicus must fall. Among other things:

(1) because the estimated nationwide emissions from the challenged rules would be de minimis even if aggregated in a single non-attainment area, (*see* p. 67, below), study of the "localized" impacts of such emissions would not be meaningful and was not required, *see Pet. Br.* at 35-36, *Int. Br.* at 28-29; *Am. Br.* at 20-21 (citing 40 C.F.R. § 1508.27(a));

(2) because the rules have no meaningful "localized" impacts, there was no reason for FMCSA to believe—as the parties assert (*Int. Br.* at 16; *Am. Br.* at 21)—that the rules may violate any federal or state air quality standards for any particular region, (*see* 40 C.F.R. § 1508.27(b)(10));

(3) because inspection-related emissions will remain a fraction of overall operational emissions in future years, the FMCSA did not act unreasonably, as the parties allege (*Pet. Br.* at 36; *Int. Br.* at 18-19, Am. Br. at 21, in performing emissions estimates only for the year after the rules go into effect, *see* 40 C.F.R. § 1508.27(b)(6);

(4) because the constituents of inspection-related emissions will be the same as, and an insignificant part of, overall emissions from trucks operating in the United States, the FMCSA did not act unreasonably, (*see Int. Br.* at 20-26; Am. Br. at 22), in failing to analyze the specific effects of inspection-related emissions on cancer rates generally or on cancer rates generally or on respiratory illnesses among children; and

(5) because the Petitioners never challenged the EA's analysis of the effects of the safety rules themselves—as distinguished from the effects of modifying the trade moratorium—the environmental effects of the FMCSA's rulemaking cannot be described as "highly controversial," (*see* 40 C.F.R. § 1508.27(b)(4), even if there may be controversy over the effects of modifying the trade moratorium (*see Pet. Br.* at 40).

In sum, none of the above alleged flaws (or any other alleged flaw) in the EA amounts to a flaw when viewed in context of the scope of the challenged rules and the scope of the EA. Because the Petitioners have not raised "substantial questions" about whether the challenged rules will have significant environmental impacts, the FMCSA's FONSI must be upheld. *Wetlands Action Network*, 222 F.3d at 1119-20.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Nos. 02-70986, 02-71249

PUBLIC CITIZEN, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION ET AL.,
RESPONDENTS

NATURAL RESOURCES DEFENSE
COUNCIL, ET AL., INTERVENORS

Petition for Review of Interim
Final Rules Promulgated by Federal Motor Carrier
Safety Administration

PETITIONERS' EVIDENCE IN SUPPORT OF STANDING

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Laura MacCleery	01
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Richard C. Bell	03
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DECLARATION OF LAURA MACCLEERY

I, Laura MacCleery, declare as follows:

1. I am Laura MacCleery, Counsel for Auto Safety and Regulatory Affairs of Public Citizen. I have held that position since September 2000, I am capable of making and authorized to make the following declaration as a result of my duties and authority at Public Citizen. I am admitted to practice law in the State of Colorado, and am currently on inactive status.

2. I am aware of Public Citizen's status as a membership organization. Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts and chartered under the laws of the District of Columbia as a membership organization. Public Citizen's national office is located in Washington, D.C. and has several national divisions, including our Critical Mass Energy and Environment Program. Public Citizen has approximately 125,000 members in the United States.

3. Some of Public Citizen's member include residents along the Mexican border area in the United States and will be negatively affected by increases in emissions as a result of the implementation of the rules in question in this case. In California, Public Citizen has approximately 34,005 member. About 2,567 of those members live in greater Los Angeles, 1,205 live in the San Diego area, and 10 live in El Centro, California, in Imperial County. In Texas, Public Citizen has approximately 7,652 members, 1,094 of whom live in the greater Houston area.

4. I am familiar with the two Petitions for Review filed by Public Citizen and other organizations against

various agencies and officials of the federal government, known as *Public Citizen v. Department of Transportation*, Ninth Circuit Case Nos. 02-70986, 02-71249. Public Citizen seeks to prevent the negative health effects that will result if Mexico-domiciled trucks begin operating throughout the United States: In particular, Public Citizen members live and work in such areas as Los Angeles, San Diego, and Houston–areas that will be most affected by increased emissions from Mexico-domiciled trucks–will be exposed to such emissions, and as a result may suffer adverse health effects.

5. Public Citizen fights for broad range of public interest issues. Many of these issues relate directly or indirectly to environmental concerns. As part of the Coalition for Sensible Safeguards, a coalition comprised of environmental labor and other watchdog groups, Public Citizen opposes cross-agency requirements imposed by the Office of Management and Budget which have the effect of hampering, delaying or eliminating environmental and public health regulations. Overall, many aspects of Public Citizen's program of activities and involvement seek to preserve the public health and natural environment. Specific examples are below.

6. Public Citizen's Critical Mass Energy and Environment Program works to protect citizens and the environment from the dangers posed by nuclear power and seek policies that will lead to safe, affordable and environmentally sustainable energy. It also advocates creation of an agricultural and food distribution system that guarantees safe, wholesome food produced in a humane and sustainable manner, and works to safeguard the world's fragile water resources from exploitation, privatization, and mass diversion. This program has carried out the following actions: 1) An aggressive

public campaign to defeat the siting of Yucca Mountain, Nevada, as a nuclear waste repository, in part due to the environmental consequence for that area and the environmental hazards posed by transportation of nuclear waste; 2) Exposed fraud inherent in "green power" in the context of the deregulation of the electricity markets; 3) Organized the opposition to water privatization efforts in New Orleans, Louisiana and Stockton, California.

7. Public Citizen's Congress Watch program works to protect consumer interests before the U.S. Congress and serves as a government watchdog. Public Citizen is committed to preserving health, safety and environmental safeguards in face of a political opposition from regulated industries, thereby preventing "regulatory rollback." Toward this end, Public Citizen acts as a watchdog, overseeing congressional, executive branch and federal agency actions affecting the regulatory process, alerting the public and Congress when safeguards are threatened, and encouraging Congress to enact legislation that puts public health, safety and the environment first. This program has carried out the following actions: 1) Urged Congressional and public support for the precautionary principle, which is a system of decision-making on regulatory priorities and programs that would put public health and environmental impacts at the center of policymaking; 2) Vigorously opposed the nomination of John Graham, a chemical, mining, steel and auto industry-backed academic, to become the nation's "regulatory czar" at the Office of Information and Regulatory Affairs, because we believed that he would work to block environmental and public health and safety protections; 3) Continue to participate in efforts to monitor the Bush

Administration's impact on health, safety and environment in the regulatory context.

8. Public Citizen's Global Trade Watch program leads the way in educating the American public about the enormous impact of intentional trade and economic globalization on our jobs, the environment, public health and safety, and democratic accountability. High among the issues handled by the Global Trade Watch program is the environment which is being threatened by corporate-led globalization, including the downward "harmonization" of health, safety and environmental standards and the over-ruling of national and local environmental standards by unaccountable international tribunals. This program has carried out the following actions: 1) With the Public Citizen President's Office, organized opposition to the forced opening of the U.S.-Mexico border under the North American Free Trade Agreement (NAFTA) to long-haul trucks due to the environmental and safety risks posed by such trucks; 2) Built a strong grassroots movement to protest over-reaching by the World Trade Organization; and 3) Regularly publishes Harmonization Alert to inform citizens of threats to hard-won environmental and public health standards.

9. Public Citizen maintains two state offices in California and Texas. Among other issues, the Public Citizen's Texas State office concerns itself with environmental enforcement policies, clean air issues, global warming education, promoting renewable/clean energy, product safety, nuclear safety, and pesticide safety in schools and for the general public. Public Citizen's Texas office recently published a report entitled "Dirty, Dangerous and Deadly Diesels," detailing the latest evidence on threats to the human

health and the environment from carcinogens in diesel exhaust.

I declare under penalty of perjury under the laws of the United States and the District of Columbia that the foregoing is true and correct to the best of my knowledge.

Executed at Washington, DC, this 30th day of July, 2002.

/s/ LAURA MACCLEERY
LAURA MACCLEERY

DECLARATION OF JOHN WILSON

I, John D. Wilson, declare as follows:

1. I am currently a member of Public Citizen and have been a member since 1995. I am also Executive Director of the Galveston-Houston Association for Smog Prevention (GHASP). GHASP is a community based environmental organization dedicated to improving the quality of our region's hazardous air.

2. I am with the Petition filed by Public Citizen and other organizations against various agencies and officials of the federal government, known as *Public Citizen v. Department of Transportation*, Ninth Circuit Case Nos. 02-70986, 02-71249. Public Citizen seeks to prevent the negative health effects that will result if Mexico-domiciled trucks begin operating throughout the United States.

3. I am a resident of Texas and reside at 518 Woodland in the Woodland Heights area of Houston, just northwest of the intersection of Interstate 10 and Interstate 45. During the most pollution-prone periods, the prevailing winds are from the southeast. As a result, this area is heavily impacted by diesel pollution primarily from large commercial trucks. I spend most of my time in the Houston area and therefore am directly affected by diesel pollutants that affect Houston. I am married and have a 10-month-old baby and have serious concerns about the health effects of air pollution upon my family.

4. Smog levels are extremely bad in the Houston area. As a result, I am forced to limit outdoor activities extensively to protect my families' health. I keep myself informed as to predicted smog levels by subscribing to an ozone alert email list that is offered by

local government. Due to the extreme smog problems in Houston, I often receive these email alerts. When I receive these alerts I severely limit the outdoor activities of my family, including walking, hiking and jogging activities, and I try to avoid taking my daughter outside. In particular, I avoid Memorial Park during ozone warning, which is one of our favorite places to enjoy the outdoors in Houston.

5. Air pollution on Houston freeways is hazardous. I am familiar with studies that show elevated levels of pollution when driving on crowded freeways. Although I often prefer to drive on smaller roads, due to the transportation system in Houston it is often necessary to drive in heavy traffic with many large diesel trucks. I am concerned about the long-term effect that breathing this pollution will have on my family, but I am unable to avoid congested or heavily traveled freeways with many diesel vehicles.

6. I declare under penalty of perjury under the laws of the United States and the State of Texas that the foregoing is true and correct to the best of my knowledge.

Executed at 518 Woodland, Houston, TX, this 30th day of July, 2002.

Signature Illegible

DECLARATION OF RICHARD C. BELL

I, Richard C. Bell, declare as follows:

1. I am the Executive Assistant to C. Thomas Keegel, the General Secretary-Treasury of the International Brotherhood of Teamsters, AFL-CIO ("IBT"). I am familiar with IBT's membership records, because I have worked with them in various capacities since 1971.

2. The IBT is one of the largest labor unions in the world. The IBT 1.4 million members, who live throughout the United States and Canada. Of that number, 1.29 million alone live in the contiguous United States. Approximately 130,000 IBT members work in the freight industry. Some of these members include truck drivers who haul goods from the Mexican border area throughout the United States. In California alone, the IBT has approximately 201,877 members. About 134,429 of those members live in Los Angeles, San Diego, and Imperial Counties. In Texas, the IBT has approximately 28,000 members, 6,200 of whom live in Harris County (which includes Houston).

3. I am familiar with two Petitions for Review filed by the IBT and other organizations against various agencies and officials of the federal government, known as *Public Citizen v. Department of Transportation*, Ninth Circuit Case Nos. 02-70986, 02-71249. The IBT seeks to prevent two primary effects that will result if Mexico-domiciled trucks begins operating throughout the United States: First, IBT members who live and work in such areas as Los Angeles, San Diego, and Houston - areas that will be most affected by increased emission from Mexico-domiciled trucks-will be exposed to such emissions, and as a result may suffer adverse health effects. Second, freight carriers operating U.S.-

domiciled trucks, which are subject to expensive emissions control requirements, will likely be undercut by companies availing themselves of the less costly purchase and operation of Mexico-domiciled trucks. The decreased business available to U.S. domiciled trucks will likely result in lay-offs of U.S. truck drivers, including IBT members.

4. Attached as Exhibit A is a true and correct copy of the cover page and Article I of the IBT Constitution. The objects of the IBT as set forth in Article I of the Constitution include improving working conditions; advancing the rights of workers and the welfare of all people; and engaging in activities that further the interests of IBT members. Under this broad mandate, the IBT has taken a number of actions to protect the environment and the health of its members and others.

5. For instance, on February 7, 1994, IBT filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit to challenge under the Clear Air Act an EPA rule with respect to the pesticide methyl bromide that could adversely affect the health of IBT members. Attached as Exhibit B is a true and correct copy of the Petition for Review. Attached as Exhibit C is Petitioners' Statement of Issues to be Raised, filed March 17, 1994, in the methyl bromide action. That Statement presents four issues with respect to why the EPA rule was inadequate to protect public health and the environment. On January 29, 1998, the parties settled the action, with EPA agreeing to modify its rule. Attached as Exhibit D is a true and correct copy of the settlement agreement.

I declare under penalty of perjury under the laws of the United States and the District of Columbia that the

foregoing is true and correct to the best of my knowledge.

Executed at Washington, D.C., this 1st day of August, 2002.

/s/ RICHARD C. BELL
RICHARD C. BELL

* * * * *

DECLARATION OF ANNA SEBASTIAN

I, Anna Sebastian, declare as follows:

1. I am currently a member of Teamster Local 63 and have been a member for eighteen years.

2. I am generally familiar with the Petition filed by Teamsters and other organizations against various agencies and officials of the federal government, known as *Public Citizen v. Department of Transportation*, Ninth Circuit Case Nos. 02-70986, 02-71249. Teamsters seek to prevent the negative health effects that will result if Mexico-domiciled trucks begin operating throughout the United States.

3. I am a resident of California and reside at 235 South Platina Drive, Diamond Bar California. I work in Rialto California near Riverside. These areas are heavily impacted by diesel pollution primarily from large commercial trucks. I spend most of my time in or around the greater Los Angeles areas. I have a six-year old son and have serious concerns about the health effects of air pollution upon my family. Indeed, both my son and I have asthma that is made worse by any increases in smog levels.

4. Smog levels are extremely bad in the Los Angeles County and Rialto area. As a result, I am forced to limit outdoor activities to protect my families' health. I pay attention to pollution levels and keep myself informed as to predicted smog levels by watching television news reports. When the reports suggest high levels I make my child play indoors to minimize the negative health impact. In particular, I do not let my child play baseball in the park on smoggy days despite the fact that he loves to play this sport. Also,

when the days are smoggy we cannot see the beautiful mountains to the North.

5. If for some reason we do end up outside on smoggy days, I am required to do a breathing treatment for my son and myself so that we may sleep.

6. I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct to the best of my knowledge.

Executed at Rialto, California, this 1st day of August, 2002.

Signature Illegible

FEB 3 2004

No. 03-358

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a Presidential foreign affairs and foreign trade action that is otherwise exempt from environmental-review requirements under the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), and the Clean Air Act, 42 U.S.C. 7506(c)(1), became subject to those requirements as a result of a rulemaking action concerning motor carrier safety by the federal agency charged with that responsibility.

PARTIES TO THE PROCEEDING

Petitioners are: United States Department of Transportation; Federal Motor Carrier Safety Administration (FMCSA); Annette M. Sandberg, as Administrator, FMCSA; and David Martin, as Western Field Administrator, FMCSA.

Respondents who were petitioners in the court of appeals below are: Public Citizen; Brotherhood of Teamsters, Auto and Truck Drivers, Local 70; California Labor Federation; California Trucking Association; Environmental Law Foundation; and International Brotherhood of Teamsters.

Respondents who were petitioners-intervenors in the court of appeals below are: Natural Resources Defense Council and Planning and Conservation League.

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In the Supreme Court of the United States

No. 03-358

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 316 F.3d 1002. The rulemaking decisions of the Federal Motor Carrier Safety Administration are published at 67 Fed. Reg. 12,702 (Pet. App. 53a-124a), 67 Fed. Reg. 12,758 (Pet. App. 125a- 202a), and 67 Fed. Reg. 12,776 (Pet. App., 203a-220a).

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2003. A petition for rehearing was denied on April 10, 2003 (Pet. App. 221a-222a). On June 30, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 8, 2003. On July 28, 2003, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including September 8, 2003. The petition for a writ of certiorari was filed on that date and was granted on

December 15, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory provisions and regulations are set out in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

In November 2002, the President lifted a trade moratorium on certain operations by Mexican motor carriers in the United States. The President took that action pursuant to express congressional authorization, in furtherance of foreign policy and foreign trade objectives of the United States, and to comply with the ruling of an international arbitration panel under the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 605 (1993). In anticipation of the President's action, the Federal Motor Carrier Safety Administration (FMCSA), which is the agency within the United States Department of Transportation (DOT) that has responsibility for motor carrier safety, issued regulations addressing the application of United States safety requirements to those Mexican motor carriers that would be permitted to operate in the United States once the moratorium was lifted.

In this case, the Ninth Circuit held that FMCSA, before promulgating its safety regulations, was required to review the environmental effects of the President's foreign trade determination under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), and the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1). The court of appeals relied on respondents' contentions that the new cross-border operations by Mexican trucks that are permitted under the President's trade decision will have adverse air quality effects in the United States, and that those effects are attributable to FMCSA's safety rulemakings. The court concluded that FMCSA had to study that air quality issue before it could fulfill its separate statutory responsibility of establishing safety-related regulations governing the operations of Mexican motor carriers.

The court of appeals' decision is incorrect. The determination to allow cross-border operations by Mexican carriers was the result of the joint exercise by Congress and the President of their constitutional responsibilities for foreign trade and foreign relations, and was made in accordance with NAFTA obligations and pursuant to statutory provisions vesting trade authority directly in the President. NEPA and the CAA, by contrast, establish procedural requirements that guide subsidiary decision-making by federal agencies. Congress did not extend those requirements to the President, whose constitutional and statutory responsibilities demand greater flexibility, particularly in the areas of foreign relations and foreign trade that are at issue here.

In its safety rulemakings, moreover, FMCSA lacks the authority and expertise to pass upon the many factors—including relations with other Nations, compliance with international agreements such as NAFTA, and environmental and other issues involved in entering into and implementing trade agreements—that Congress and the President may assess in making foreign trade and foreign relations decisions. Requiring FMCSA to study the environmental effects of the President's action to lift a trade moratorium is inconsistent with Congress's exclusion of Presidential action from the requirements of NEPA and the CAA, and would not be compatible with FMCSA's implementation of its discrete duties within its own sphere of responsibility and expertise.

1. a. The President is vested with express statutory authority to determine whether Canadian and Mexican truck and bus operators may operate in the United States. See 49 U.S.C. 13902(c). Before 1982, motor carriers domiciled in

Canada and Mexico were able to obtain certification from the Interstate Commerce Commission (ICC) to operate within the United States. See 49 U.S.C. 301 *et seq.* (1976). In 1982, however, Congress enacted a two-year moratorium on new grants of United States operating authority to motor carriers from those countries. 49 U.S.C. 10922(*l*)(1) (1982). Congress enacted the moratorium in response to concerns that United States motor carriers were being denied the same access to Canadian and Mexican markets that carriers from those countries had to the United States. See Pet. App. 56a. Congress authorized the President to extend the moratorium beyond the initial two years if Canada or Mexico "substantially prohibit[ed]" operations by United States carriers, 49 U.S.C. 10922(*l*)(1) (1982), and to lift or modify the moratorium if he determined that doing so was in the "national interest," 49 U.S.C. 10922(*l*)(2) (1982).

Shortly after the moratorium was imposed, the United States entered into a bilateral understanding with Canada, and President Reagan lifted the moratorium on new grants of operating authority to Canadian carriers. See *Determination Under the Bus Regulatory Reform Act of 1982*, 47 Fed. Reg. 54,053 (1982); see Pet. App. 56a. In a series of actions under the 1982 statute, however, Presidents Reagan, Bush, and Clinton subsequently extended the moratorium on new grants of authority to Mexican motor carriers. See Pet. App. 9a & n.2 (citing presidential orders); 49 U.S.C. 13902 note. Although the moratorium did not apply to Mexican carriers that already had authority to operate in the United States or that were not required to obtain operating authority subject to the moratorium (such as carriers that operated solely in commercial zones along the United States-Mexico border), the Presidential actions prevented additional Mexican carriers from obtaining grants of operating authority to provide trucking services and scheduled bus services into or

within the United States beyond the border zones. See Pet. App. 9a, 56a-57a.

In 1995, Congress recodified the statute that authorized the moratorium and amended it to provide that the existing Presidential restrictions on new operations by Mexican motor carriers would remain in effect "unless and until" the President made an express determination to continue, remove, or modify those restrictions. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, Tit. I, § 103, 109 Stat. 880 (49 U.S.C. 13902(c)(4)).[1] Under the 1995 law, the President is empowered to impose new restrictions on Canadian and Mexican motor carriers upon a determination that policies or practices of Canada or Mexico impose "unreasonable or discriminatory" burdens on United States motor carriers seeking to operate in those countries. 49 U.S.C. 13902(c)(1). The President may remove or modify existing restrictions if he determines that doing so would be "consistent with the obligations of the United States under a trade agreement or with United States transportation policy." 49 U.S.C. 13902(c)(3). If the President allows foreign carriers to obtain authority to provide service in the United States, those carriers are subject to "all applicable laws and regulations pertaining to fitness, safety of operations, financial responsibility, and [federal] taxes." 49 U.S.C. 13902(c)(8).

b. Congress enacted the 1995 amendments to the moratorium law—which expressly authorize the President to

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[1] There are approximately 4.5 million northbound truck crossings of the United States-Mexico border each year. See J.A. 85, Fig. 3-2. Because of the moratorium, Mexican cargo that enters the United States by truck generally is transported by Mexican carriers only to terminals within the border commercial zones, where it is transferred to United States carriers for transport to its final destination. Passengers using scheduled bus services must follow similar procedures for their trips from Mexico to the United States. See J.A. 123-124; Pet. 25-26.

modify the moratorium in light of a trade agreement—against the background of NAFTA. In 1990, the United States, Mexico, and Canada initiated negotiations with the goal of eliminating or reducing trade barriers and creating a free-trade area that encompasses the three countries. In December 1992, the leaders of the three nations signed NAFTA. Congress approved and took steps to implement NAFTA through the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Pub. L. No. 103-182, 107 Stat. 2057 (19 U.S.C. 3301-3473). See generally Pet. App. 7a-8a. In NAFTA Annex I, 32 I.L.M. at 742 (Schedule of the United States), the United States agreed to phase out the moratorium and, by January 2000, permit Mexican carriers to obtain operating authority for cross-border service from Mexico to points in the United States beyond the border area. NAFTA took effect on January 1, 1994. See *Memorandum on Implementation of NAFTA*, 29 Weekly Comp. Pres. Doc. 2641 (Dec. 27, 1993); 19 U.S.C. 3311(b).

On NAFTA's effective date, President Clinton began the incremental modification of the trade moratorium by allowing the licensing of Mexican carriers to provide certain bus services in the United States. See Pet. App. 57a. Due to concerns about the adequacy of Mexico's regulation of motor carrier safety, however, President Clinton did not continue to ease the moratorium on the timetable specified in NAFTA. See *id.* at 57a-58a; J.A. 53; see also C.A. Supp. E.R. 17-20; *Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. 22,371-22,372 (2001).

The government of Mexico challenged the United States' implementation of NAFTA's motor carrier provisions by filing complaints under NAFTA's dispute-resolution process. See Pet. App. 59a. In February 2001, an international arbi-

tration panel convened under that process determined that the "blanket refusal" by the United States "to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under [NAFTA]." J.A. 279. The arbitration panel "recommend[ed] that the United States take appropriate steps to bring its practices with respect to cross-border trucking services * * * into compliance with its obligations under the applicable provisions of NAFTA." J.A. 280.

Almost immediately after the arbitrators' decision, President Bush made clear his intention to lift the moratorium on cross-border operations following the preparation of new regulations governing grants of operating authority to Mexican motor carriers, in order to comply with NAFTA and promote trade between the United States and Mexico. Pet. App. 10a; J.A. 53; Pet. 5 & n.2.

c. The Federal Motor Carrier Safety Administration is the agency within DOT that is responsible for motor carrier safety and registration. See 49 U.S.C. 113(f).[2] FMCSA's statutory mandates include "ensur[ing]" safety, see 49 U.S.C. 31136; establishing minimum levels of financial responsibility for motor carriers, see 49 U.S.C. 31139; and prescribing federal standards for safety inspections of commercial motor vehicles, see 49 U.S.C. 31142. FMCSA must grant registration to all domestic or foreign motor carriers that are "willing and able to comply with" the applicable safety, fit-

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[2] In 1999, Congress transferred responsibility for motor carrier safety within DOT from the Federal Highway Administration to the newly created FMCSA. See Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748; 49 U.S.C. 113. Previously, when Congress had abolished the ICC, it assigned most of the ICC's responsibilities for motor carrier operations to the Secretary of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C. 13301, 13501. See also J.A. 51.

ness, and financial-responsibility requirements. 49 U.S.C. 13902(a)(1). FMCSA has no authority to impose or enforce emissions controls or establish other environmental requirements unrelated to motor carrier safety, or to deny motor carriers operating authority based on such criteria. See J.A. 51-52. The Environmental Protection Agency (EPA), not FMCSA, administers the program under the Clean Air Act that establishes emissions standards for new motor vehicles and engines. See 42 U.S.C. 7521; J.A. 202.

In May 2001, following the President's statements of his intent to comply with the decision of the NAFTA arbitration panel and "in anticipation of the modification of the moratorium," J.A. 54, FMCSA published for comment proposed rules concerning safety regulation of Mexican motor carriers. One of the proposed rules (the Application Rule) addressed the establishment of a new application form specifically for Mexican carriers that seek cross-border operating authority. The proposed form required those carriers to submit more detailed safety-related information than is obtained from domestic or Canadian carriers, or would have been obtained from Mexican carriers under FMCSA's existing rules. See *Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. at 22,371, 22,372.[3] Another proposed rule (the Safety Monitoring Rule) addressed the establishment of a safety-inspection regime for all Mexican motor carriers, including (but not limited to) the new carriers that would receive operating authority under the Application Rule. See *Safety Monitoring System and Compliance Initiative for Mexican Motor Carriers Operating in the United States*, 66 Fed. Reg. 22,415 (2001).[4]

[3] In 1995, as part of its efforts to prepare for NAFTA's implementation, the ICC had promulgated application requirements and an application form for Mexican carriers seeking authority to conduct cross-border operations. Pet. App. 57a; J.A. 32; see *Freight Operations by Mexican Motor Carriers: Implementation of North American Free Trade Agreement*, 60 Fed. Reg. 63,981 (1995). Approximately 190 applications were filed under the ICC's regulations. Pet. App. 58a; J.A. 53-54. Because the President did not modify the moratorium on cross-border operations on the schedule established by NAFTA, neither the ICC, nor its successor agencies within DOT (see note 2, *supra*), granted operating authority to any Mexican carriers under the regulations that the ICC promulgated in 1995.

[4] A third proposed rule that FMCSA issued on the same day concerned applications for operating authority by Mexican carriers operating solely within border commercial zones, which were not covered by the moratorium on cross-border operations. See *Revision of Regulations and Application Form for Mexican-Domiciled Motor Carriers to Operate in U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, 66 Fed. Reg. 22,328 (2001). That rule does not pertain to the President's modification of the trade moratorium to allow cross-border operations and is not at issue in this case.

d. In December 2001, Congress enacted Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864. Section 350 provided that no funds appropriated under the 2002 Appropriations Act could be "obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border" until, among other things, FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers that, in some particulars, were not already contained in either the Application and Safety Monitoring Rules that FMCSA had proposed or the application rules established by the former ICC, see note 3, *supra*. Pub. L. No. 107-87, § 350(a), 115 Stat. 864; see Pet. App. 53a-54a, 61a-62a. Congress later extended the conditions of Section 350 to appropriations for Fiscal Years 2003 and 2004.

See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130.

e. In January 2002, FMCSA issued a Programmatic Environmental Assessment for the proposed Application and Safety Monitoring Rules (and other proposed rules not at issue in this case). See J.A. 36-231. Under NEPA, federal agencies must prepare an environmental impact statement (EIS) before taking any "major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 C.F.R. 1500.3; *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 (1979). The CEQ regulations allow an agency to prepare a more limited document, known as an environmental assessment (EA), if the agency has neither established a categorical exclusion that excuses the proposed action from the requirement of environmental analysis, nor already determined to prepare a full EIS. See 40 C.F.R. 1501.3, 1501.4. An EA is a "concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. 1508.9(a). If the agency determines on the basis of the EA that an EIS is not required, then it must issue a "finding of no significant impact" (FONSI), which is a document "briefly presenting" the reasons why the agency action will not have a significant impact on the human environment. 40 C.F.R. 1501.4(e), 1508.13.

In the EA for its proposed Mexican-truck regulations, FMCSA noted several relevant circumstances and assumptions. FMCSA recognized that the proposed rules would have "no practical impact" until the occurrence of the "intervening event" of the President's modification of the

trade moratorium. J.A. 56, 57. FMCSA accordingly assumed in studying the effects of its proposed regulations that the President would lift the moratorium on granting new authority for cross-border operations. *Ibid.* FMCSA further noted that as a result of Section 350, the President's anticipated lifting of that moratorium would have no effect until FMCSA promulgated the required regulations. J.A. 57-58.

FMCSA noted "that the Presidential order to modify the moratorium could result in changes in trade volume and operations between the United States and Mexico," possibly including an increase in the number of trips by Mexican commercial motor vehicles in the United States (which might be offset by a reduction in trips by United States trucks and buses). J.A. 60. But FMCSA determined that "this and any other associated effects in trade characteristics would be the result of the modification of the moratorium" by the President, not FMCSA's implementation of the proposed safety regulations governing those carriers that take advantage of the opportunity afforded by the President's action. *Ibid.*

Against that background, FMCSA's EA addressed the environmental impacts associated with three different scenarios: (1) a Baseline Scenario, in which the President hypothetically would not act to modify the moratorium and FMCSA would not alter its existing regulations governing cross-border operations by Mexican motor carriers; (2) a No Action Alternative, in which (contrary to what was possible as long as the appropriations restrictions that Congress adopted during FMCSA's preparation of the EA remained in place) the President's modification of the trade moratorium hypothetically would be implemented without any change in FMCSA's existing regulations; and (3) the Proposed Action Alternative, in which the President would modify the moratorium and FMCSA would adopt its proposed regulations.

J.A. 56. The EA considered environmental impacts in the categories of traffic and congestion, J.A. 123-135, public safety and health, J.A. 135-136, air quality, J.A. 146-167, noise, J.A. 167-180, and socioeconomic factors and environmental justice, J.A. 180-192.

Based on that analysis, FMCSA concluded that the environmental impacts of the proposed Application and Safety Monitoring rules "are expected to be minor." J.A. 193. FMCSA noted that "the Proposed Action by FMCSA is mostly administrative," with "[t]he only area of potential [environmental] concern" being a "marginal[] increase" in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations. *Ibid.* The minor environmental effects of those increased inspections (such as emissions and noise from trucks being inspected, and danger to passing motorists), FMCSA explained, could be addressed and avoided in the inspections process, see 42 U.S.C. 4332(2)(C)(ii). J.A. 193-196.[5] In addition, the increased inspection-related emissions would be partially or wholly offset by an incidental air-quality benefit of the new safety regulations—that FMCSA's adoption of stricter safety requirements might incrementally reduce the number of Mexican trucks operating in the United States, see J.A. 126, 137, 157, 167. FMCSA accordingly concluded in the EA that "[t]he Proposed Action by FMCSA has no significant

[5] FMCSA estimated that, in 2002, Mexican operators would operate approximately 72,000 commercial motor vehicles subject to the new regulations (of which about half would engage in operations outside the border commercial zones), and there would be approximately 230,000 inspections of those vehicles. J.A. 67, 132, 165. By contrast, there were approximately 4.5 million commercial motor vehicles operating in the United States. J.A. 149. Furthermore, new cross-border operations by Mexican-domiciled trucks often would substitute for, rather than be cumulative of, operations by United States trucks. See J.A. 135.

impacts and thus requires no mitigation" before adoption of the proposed regulations. J.A. 196.

On the same day that it released the EA, FMCSA issued a FONSI stating that the EA "provides sufficient evidence and analysis for determining that an environmental impact statement is not required" because the proposed regulations "would have no significant effect on the human environment." J.A. 34-35.

f. On March 19, 2002, FMCSA issued its Application Rule (Pet. App. 53a-124a) and Safety Monitoring Rule (*id.* at 125a-202a). FMCSA issued both rules as "interim" final rules and delayed their effective date until May 3, 2002, to allow public comment on provisions that FMCSA added to the proposed regulations to satisfy the requirements of Section 350, which had been enacted after the proposed regulations were published. See *id.* at 53a-54a, 61a-62a, 125a, 147a-149a. In preambles to the new regulations, FMCSA explained that they were designed to implement the requirements of Section 350 and "ensure the safe operation of Mexico-domiciled motor carriers in the United States." *Id.* at 54a, 126a; see *id.* at 127a-128a.

In the regulatory preambles, FMCSA relied on the January 2002 EA and FONSI to demonstrate its satisfaction of NEPA's requirements in promulgating the Application and Safety Monitoring Rules. Pet. App. 64a-65a, 106a-107a, 154a-155a, 182a. Next addressing Clean Air Act issues, FMCSA determined that it was not required to perform a so-called "conformity review" of the proposed regulations under 42 U.S.C. 7506(c)(1). Pet. App. 65a-66a, 155a. Section 7506(c)(1) provides that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to" the requirements of a state air-quality implementation plan that has been established under the CAA. 42

U.S.C. 7506(c)(1). EPA has promulgated regulations implementing the conformity-review requirement. See 40 C.F.R. Pt. 93. Under those regulations, a federal agency need not conduct a full-blown conformity review if its intended action falls within one of several regulatory exemptions, including an exemption for actions that will not result in direct or indirect emissions above specified threshold levels. 40 C.F.R. 93.153(b).

Consistent with the air-quality analysis of the EA, see J.A. 146-167, FMCSA determined in pertinent part that emissions attributable to the Application and Safety Monitoring Rules (*i.e.*, emissions from increased roadside inspections of Mexican trucks that would be granted authority to operate in the United States after the moratorium was lifted) would be below EPA's threshold emission levels and a full conformity review therefore was not required under the CAA. Pet. App. 65a-66a, 155a. Also consistent with the EA, FMCSA supported its determination that no conformity review was required under the CAA by again explaining that its rulemakings were "actions to improve FMCSA's regulatory oversight" of motor carrier safety, "not * * * to modify the moratorium and allow Mexican trucks to operate beyond the border," which is an action outside FMCSA's authority and was for the President to decide. *Id.* at 66a, 79a.[6]

2. In November 2002, after FMCSA promulgated the Application and Safety Monitoring Rules, the President lifted the moratorium insofar as it prohibited qualified motor

[6] FMCSA also relied on EPA's regulation creating an exemption from the CAA's conformity-review requirement for agency rulemakings. See Pet. App. 65a-66a; 40 C.F.R. 93.153(c)(2)(iii). The court of appeals found that exemption inapplicable to FMCSA's Application and Safety Monitoring Rules. See Pet. App. 48a-51a. The court of appeals' rejection of that alternative ground for FMCSA's conformity-review decision is not at issue in this case. See Pet. 10 n.4.

carriers domiciled in Mexico from obtaining operating authority to provide cross-border truck and scheduled bus services. Pet. App. 232a-234a. The President determined that permitting cross-border operations is "consistent with obligations of the United States under NAFTA and with our national transportation policy," and that "expeditious action is required to implement th[e] modification to the moratorium" on United States operations by Mexican motor carriers. *Id.* at 233a. The President further noted that, when Mexican motor carriers obtain authorization to provide cross-border service, they "will be subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the United States," including safety and environmental laws. *Id.* at 233a-234a. The President left the moratorium in place with respect to any authorization of Mexican-domiciled motor carriers to provide truck or bus services between points in the United States. *Ibid.*

3. Before the President acted, respondents had filed petitions for judicial review of the Application and Safety Monitoring Rules, asserting that the rules were promulgated in violation of NEPA, the conformity requirement of the CAA, and the Administrative Procedure Act (APA), 5 U.S.C. 701-706. See Pet. App. 13a. In January 2003, the Ninth Circuit granted the petitions and set aside the rules, thus preventing implementation of the President's border-opening decision. *Id.* at 1a-52a.[7]

[7] On the same day that FMCSA published the Application and Safety Monitoring Rules, it also promulgated a rule to establish training and certification requirements for all persons who conduct safety inspections and audits of domestic or foreign motor carriers under FMCSA's regulations. See Pet. App. 203a-220a (Auditor Certification Rule). Although the Auditor Certification Rule is not limited to inspections of Mexican motor carriers, Section 350 made promulgation of that rule one of the prerequisites to expending funds on processing Mexican carriers' applications for cross-border operating authority. See Pub. L. No. 107-87,

a. The court of appeals first determined (Pet. App. 14a-26a) that respondent Public Citizen—which alleges that some of its members who live near the Mexican border would suffer adverse health consequences from increased emissions attributable to cross-border operations by Mexican commercial vehicles, see *id.* at 16a-17a; J.A. 491, 496-497—has standing to challenge FMCSA's safety regulations. The court reasoned that Public Citizen sufficiently alleged both causation and redressability because (1) Mexican trucks would be able to conduct cross-border operations (possibly leading to adverse health effects) if FMCSA's safety regulations were upheld, and (2) if the petition for review were granted, then trucks of new Mexican carriers would be temporarily excluded from the United States by virtue of Section 350, pending FMCSA's completion of a new environmental review. See Pet. App. 22a-23a.[8]

b. Addressing the merits of respondents' challenge to the adequacy of FMCSA's NEPA review, the court of appeals concluded that the EA was deficient because FMCSA failed to give adequate consideration to the overall environmental impact of lifting the moratorium on new cross-border operations by Mexican trucks, and instead largely confined its analysis to the limited effects of FMCSA's safety regulations themselves. Pet. App. 28a-43a. Quoting CEQ's regulations,

§ 350(a)(10)(B), 115 Stat. 866. The court of appeals invalidated the Auditor Certification Rule as well as the Application and Safety Monitoring Rules. See Pet. App. 43a-45a. After the Ninth Circuit's decision, however, FMCSA reissued the Auditor Certification Rule on the basis of an EA that addressed both NEPA and CAA issues with respect to that rule alone. See *Safety Auditor Certification: Notice of Statutory Compliance Date*, 68 Fed. Reg. 74,287 (2003). This Court's disposition of the instant case will have no direct effect on the reissued Auditor Certification Rule.

[8] Although the government argued in the court of appeals that respondents lack standing, the petition for a writ of certiorari did not ask this Court to review the standing issue.

the court determined that FMCSA was required to consider the effects of lifting the moratorium on cross-border operations because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was prepared and the decision not to prepare an EIS was made." *Id.* at 31a (quoting 40 C.F.R. 1508.7, 1508.8(b)). The court of appeals likewise stated that it was "illogical" for FMCSA to distinguish between the environmental effects of the President's trade action and the environmental effects of the agency's Application and Safety Monitoring Rules themselves. *Id.* at 37a.

The court further concluded that, in studying the long-term effects of the border opening, FMCSA should have determined the most likely routes of Mexican truck traffic and then conducted localized environmental analysis of that traffic for particular geographic areas. See Pet. App. 33a-39a. The court also faulted FMCSA for failing to consider additional alternatives to its proposed safety rules, "such as, for example, proposing more stringent controls on incoming Mexican trucks." *Id.* at 42a. The court of appeals thus remanded the case for the preparation of a "full Environmental Impact Statement." *Id.* at 52a.

c. For similar reasons, the court of appeals directed FMCSA to prepare a full Clean Air Act conformity determination for the challenged regulations. Pet. App. 52a. The court concluded that FMCSA's determination that emissions attributable to the safety rules would be below the threshold levels established in 40 C.F.R. 93.153(b)(1) was not "reliable" because, like FMCSA's NEPA analysis, the agency's CAA determination reflected what the court characterized as an "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." Pet. App. 47a. The court thus concluded that FMCSA is required under the CAA and EPA's regulations

to conduct a region-by-region review of opening the border to determine whether the threshold emission levels specified in 40 C.F.R. 93.153(b)(1) will be exceeded for particular areas and, if so, whether the border opening would conform to the applicable state air-quality implementation plan. Pet. App. 47a-48a.

d. The court of appeals recognized that, due to the requirements of Section 350, its invalidation of FMCSA's rulemakings had the effect of blocking implementation of the President's action to allow grants of cross-border operating authority to Mexican carriers. Pet. App. 23a. The court of appeals nevertheless expressed the view that its decision did not "touch on" the President's "clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c)." *Id.* at 26a.

SUMMARY OF ARGUMENT

Respondents seek to use safety rulemakings of the Federal Motor Carrier Safety Administration to press environmental concerns about the President's determination to lift the moratorium on cross-border operations by Mexican motor carriers. That trade action, however, was within the President's constitutional and statutory authority. FMCSA has no assigned role in determining whether the moratorium should be lifted or modified, and cannot deny operating authority to a motor carrier based on environmental considerations. This case thus presents the question whether environmental-review requirements that apply to FMCSA's promulgation of *safety* rules for Mexican motor carriers obligate FMCSA to scrutinize the effects of a foreign policy and foreign trade decision of the President, which is entirely outside the scope of FMCSA's assigned responsibilities.

I. It was not arbitrary or capricious for FMCSA to limit its review under the National Environmental Policy Act to the effects of its particular safety requirements, without addressing the environmental impacts of the President's decision to allow new cross-border operations by Mexican motor carriers. NEPA's environmental-review requirements apply only to federal "agencies," 42 U.S.C. 4332(2)(C), and the Council on Environmental Quality has promulgated regulations expressly providing that actions of the President are not subject to NEPA's requirements. See 40 C.F.R. 1508.12. Respondents have never suggested that, apart from the President's action to lift the moratorium on new cross-border operating authority, FMCSA's Application and Safety Monitoring Rules will have any significant environmental effects. Instead, they have challenged FMCSA's decision not to study emissions assertedly associated with the President's border-opening decision. Accordingly, NEPA's exception for Presidential action applies in this case.

The court of appeals' contrary conclusion rests on its determination that it was foreseeable that the President would take his border-opening action after FMCSA promulgated its new safety regulations. Yet FMCSA's safety rulemakings were a response to the President's previously announced intention to lift the trade moratorium on new authorizations for cross-border services in accordance with the Nation's international commitments, not vice-versa. Furthermore, FMCSA's promulgation of new safety rules did not obligate the President to carry through with terminating the moratorium.

Respondents have argued in this case that Section 350 of the 2002 Appropriations Act established a "but for" causal relationship between FMCSA's promulgation of new safety regulations and its implementation of the President's lifting of the moratorium on new grants of cross-border operating authority. Under NEPA and this Court's decisions, however, a "but for" relationship is not enough to require FMCSA to study the environmental effects of the President's decision. The clear division of responsibility between

the President and FMCSA under the Constitution and the relevant statutory provisions establishes the dividing line between those effects for which FMCSA is responsible under NEPA and those effects, including the opening of the border, for which it is not responsible. Further, there would be no decision-making benefit from preparing the EIS that the court of appeals required in this case, because FMCSA has no authority over the border-opening decision and the President specifically was not required to weigh environmental concerns under NEPA in taking his trade action.

Any motor vehicle emissions that result from the President's decision to end the trade moratorium likewise are not a "cumulative impact" of FMCSA's safety rulemakings that had to be studied under the CEQ regulations. CEQ's regulations require agencies to study the incremental environmental effects of their *own* actions in the context of foreseeable future actions by other individuals and entities. See 40 C.F.R. 1508.7. The correct focus of a NEPA investigation is thus the agency's own proposed action, which, in this case, does not include the President's lifting of the trade moratorium.

II. Just as the President is not a federal "agency" subject to NEPA, he is not a "department, agency, or instrumentality of the Federal Government" under the Clean Air Act, 42 U.S.C. 7506(c)(1). Accordingly, the President's action to open the border is exempt from the CAA's conformity-review requirement. Furthermore, under the administrative regulations that implement the conformity-review requirement, a bare "but for" relationship between an agency action and air emissions is not alone enough to make the emissions attributable to the agency action. Under the regulations, any increased emissions associated with allowing additional Mexican trucks and buses to operate in the United States are neither "direct emissions" of FMCSA's safety rulemakings (because they will not occur at the time and place that

FMCSA's safety program is implemented) nor "indirect emissions" of those safety rulemakings (because, among other things, FMCSA has no ongoing programmatic responsibility for the emissions). See 40 C.F.R. 93.152. Accordingly, FMCSA did not abuse its discretion in defining the scope of its CAA conformity analysis.

ARGUMENT

The trade policy that respondents seek to block arises from the valid exercise of powers that the Constitution vests specifically in the President and the Congress. The President's authority over foreign affairs is manifested by his powers as Commander in Chief of the armed forces (U.S. Const. Art. II, § 2, Cl. 1), to negotiate treaties (*id.* Art. II § 2, Cl. 2), to "receive Ambassadors and other public Ministers" (*id.* Art. II, § 3), and to "take Care that the Laws be faithfully executed" (*ibid.*). The President is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948); see *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive") (citation omitted). Among his other foreign-affairs duties, the President is responsible for negotiating and ensuring compliance with international trade agreements. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-321 (1936).

For its part, Congress has "broad, comprehensive" power under the Foreign Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, to "regulate Commerce with foreign Nations." *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125-126 (1973); accord *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over * * * foreign commerce is not

open to dispute."). In the exercise of that power, Congress frequently vests authority and discretion in the President to impose, modify, or rescind measures affecting foreign trade and commerce. See, *e.g.*, *Curtiss-Wright Export Corp.*, *supra*.

The North American Free Trade Agreement and ensuing trade reforms arise from a joint exercise of the President's foreign affairs power and Congress's foreign commerce power. Here, Congress has given the President express authority to determine whether, and to what extent, Mexican motor carriers should be granted access to United States markets. See 49 U.S.C. 13902(c). That authority includes the power to determine whether access should be granted pursuant to the obligations of the United States under NAFTA. See 49 U.S.C. 13902(c)(3). When the President lifted the moratorium and authorized FMCSA to begin processing applications for cross-border operations by Mexican carriers, see Pet. App. 232a-234a, he "act[ed] pursuant to an express * * * authorization of Congress" and his authority was "at its maximum, for it include[d] all that he possesses in his own right plus all that Congress can delegate." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375 (2000) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952)).

FMCSA, by contrast, lacks any authority over foreign affairs or trade policy and has no assigned role in determining whether, or to what extent, Mexican carriers as a class should be allowed access to United States markets. Instead, FMCSA's relevant authority involves granting or refusing operating authority to particular Mexican motor carriers, based solely on whether they are "willing and able to comply with" United States safety and financial-responsibility standards. 49 U.S.C. 13902(a)(1). As the EA states, FMCSA "has no authority to deviate from, or add to, th[ose] criteria," and it "is statutorily precluded from considering environmental issues" in the course of deciding whether to grant operating authority to particular carriers. J.A. 52. If a carrier satisfies the applicable statutory and regulatory requirements, FMCSA "must grant the application." *Ibid.* Thus, as FMCSA explained in the EA, "but for the moratorium" it would be required to grant operating authority to any Mexican carrier that submits an application demonstrating its willingness and ability to meet those criteria. *Ibid.* Cf. *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Co.*, 333 U.S. 103, 108-112 (1948) (discussing respective roles of the President and the CAB in approving foreign routes for air carriers).[9]

I. THE COURT OF APPEALS MISAPPLIED THE NATIONAL ENVIRONMENTAL POLICY ACT

The question presented to the court of appeals under NEPA was whether it was arbitrary and capricious for FMCSA to exclude from its environmental study the impacts of the foreign affairs and foreign trade action of the President, an action that FMCSA lacked any power to control. See Pet. App. 26a-28a; see also, *e.g.*, *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-376 (1989) (applying "arbitrary and capricious" standard); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976) (scope of EIS is matter within agency's discretion and "[a]bsent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately"); *Anderson* v. *Evans*, 350 F.3d 815, 829 (9th Cir. 2003) ("If an agency

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[9] In its Application Rule, FMCSA determined to advise applicants for cross-border operating authority of their obligation to comply with "all pertinent Federal, State, local and tribal statutory and regulatory requirements, including labor and environmental laws." Pet. App. 91a. That statement on the application form is purely "informational in nature" and does not (and could not) impose any new environmental obligation. *Ibid.*

decides not to prepare an EIS, the decision not to do so may be overturned only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (quoting 5 U.S.C. 706(2)(A)); *Town of Cave Creek* v. *FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003) (same); *Indiana Forest Alliance, Inc.* v. *United States Forest Serv.*, 325 F.3d 851, 858-859 (7th Cir. 2003) (same). FMCSA did not act arbitrarily or capriciously or abuse its discretion in applying NEPA here, and the court of appeals erred in reaching a contrary conclusion.

First, the Constitution and federal statutes vest in the President the authority to allow cross-border operations by Mexican trucks and buses, and his actions are exempt from review under NEPA. See Point I.A.1, *infra*. Second, respondents have never disputed the correctness of FMCSA's conclusion that there are no significant environmental effects associated with the Application and Safety Monitoring Rules themselves, when the President's lifting of the moratorium on new grants of cross-border operating authority is taken as a given. See Point I.A.2, *infra*. Third, any environmental consequences of allowing cross-border operations by Mexican trucks are not "effects" of FMCSA's truck-safety rulemakings that had to be studied by FMCSA under the regulations promulgated by the Council on Environmental Quality to implement NEPA. Opening the border was the responsibility of the President. See Point I.B, *infra*. Fourth, for similar reasons, FMCSA was not required to undertake a "cumulative impact" analysis addressing the President's decision to open the border. See Point I.C, *infra*.

A. FMCSA Was Not Required To Prepare An EIS Addressing The President's Action To Lift The Trade Moratorium

The President's decision to lift the moratorium on cross-border operations by Mexican carriers is not subject to

NEPA's requirement of preparing an EIS addressing "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. 4332(2)(C).

1. Presidential Actions Are Exempt From NEPA's Environmental-Review Requirements

The EIS requirement applies only to "*agencies* of the Federal Government." 42 U.S.C. 4332(2) (emphasis added). The CEQ regulations implementing NEPA, which "are entitled to substantial deference," *Marsh*, 490 U.S. at 372, provide that the federal agencies subject to NEPA do not include "the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office." 40 C.F.R. 1508.12.

The exclusion of Presidential action from the EIS requirement arises from NEPA's text and, at a minimum, rests on a reasonable administrative interpretation of the statute. In ordinary usage, an "agency" is "a department or other administrative unit of a government." *Webster's Third New International Dictionary of the English Language Unabridged* 40 (1993). The President of the United States is not an "administrative unit." We are not aware of any court decision holding that the President is an "agency" subject NEPA, and the President historically has not purported to comply with NEPA in his decision-making.

Analogously, this Court determined in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), that the President is not an "agency" subject to the Administrative Procedure Act, even though the APA's definitions of "agency" generally include "each authority of the Government of the United States" and specifically exclude Congress, the courts, and certain other entities without mentioning the President, see 5 U.S.C. 551(1), 701(b)(1). In *Franklin*, the Court reasoned that in light of the "separation of powers and the unique constitutional position of the President," "textual silence" in the

APA's definition of "agency" was "not enough to subject the President" to the procedural requirements and judicial-review provisions of the APA. 505 U.S. at 800-801. Rather, "an express statement by Congress" would be necessary to impose such restrictions on Presidential decision-making. *Id.* at 801.

The same principle applies here. Through NEPA, Congress imposed "action-forcing" procedures upon federal agencies in order to infuse environmental considerations into agency decision-making. See *Marsh*, 490 U.S. at 371 & n.14. Congress did not demonstrate any intention to affect the President's disposition of matters personally entrusted to him, particularly in sensitive and highly discretionary areas such as foreign affairs. As the facts surrounding this case well illustrate, subjecting the President's conduct of international diplomacy to the procedural requirements of NEPA would impair the President's ability to "speak for the Nation with one voice" and to make commitments concerning his own discretionary actions without fear that those commitments will be overridden by the courts. *Crosby*, 530 U.S. at 381, 382; see *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984) ("Great nations, like great men, should keep their word.") (brackets and citation omitted).

In any event, NEPA provides no private right of action. Its mandates are subject to judicial enforcement only through the APA, 5 U.S.C. 701-706. Actions of the President are unquestionably exempt from the APA under *Franklin*, 505 U.S. at 801. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 882 (1990). For that additional reason, the court of appeals erred in requiring FMCSA to prepare an EIS directed at the President's determination to allow cross-border operations by Mexican carriers. See *Chicago & S. Air Lines*, 333 U.S. at 111 ("Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate,

complex, and involve large amounts of prophecy. * * * They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").

2. Respondents Have Challenged Only FMCSA's Determination Not To Study The Environmental Effects Of The President's Action To Lift The Moratorium, Not FMCSA's Review Of The Effects Of Its Own Regulations

Throughout this case, respondents have made clear that they seek an EIS addressing new cross-border operations by Mexican motor carriers, rather than FMCSA's regulation of truck and bus safety. In their brief in opposition (at 7), for instance, respondents contended that an EIS is required because "[o]nce * * * FMCSA begins processing applications to cross the border from a large number of Mexico-domiciled trucks, substantial environmental harm will result because those trucks will emit significantly larger quantities of harmful air pollutants than U.S. trucks."[10] Respondents have reasoned that, if Mexican trucks are allowed to provide cross-border services, "there will be more Mexico-domiciled trucks in the United States." C.A. Br. of Public Citizen, et al. 32. Respondents have further argued that trucks domiciled in Mexico generally are older than trucks domiciled in the United States and are not subject to the same emissions requirements under the Clean Air Act and judicial consent decrees as United States-domiciled trucks, and, accordingly, truck emissions in the United States will increase. *Id.* at 32-

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[10] Accord, *e.g.*, C.A. Br. of Public Citizen, et al. 32 ("The challenged rules will have the practical effect—that is, the trucks crossing the border—that will create adverse environmental effects."); C.A. Br. of NRDC and Planning and Conservation League 17 ("The EA fails to take into account the public health effects that will result from an increase in the number of more polluting Mexican-domiciled trucks traveling in the U.S. once the Final Rules are implemented.").

35, 36-38; see J.A. 301-302 (rulemaking comments); but see J.A. 482-488 (government court of appeals brief, discussing respondents' theories).

None of the respondents argued in FMCSA's rulemaking proceedings that FMCSA should consider particular safety alternatives in light of environmental concerns. Respondents did not identify any different application or safety monitoring requirements that FMCSA arguably should have studied. Instead, respondents objected that the EA did not address "the effect of allowing thousands of heavily polluting Mexico-domiciled trucks to travel through * * * the United States"—*i.e.*, what they alleged to be the consequences of the *President's* decision to lift the moratorium on new grants of cross-border operating authority. J.A. 303; see J.A. 294 (comments of respondents NRDC, et al., arguing that FMCSA's proposed rules "would allow Mexican-owned trucks to drive throughout the United States, resulting in increased air pollution and other environmental hazards").

In the court of appeals, respondents similarly did not dispute the EA's conclusion that there are no significant environmental effects associated with the Application and Safety Monitoring Rules themselves, when the President's lifting of the moratorium is taken as a given in FMCSA's decisionmaking. Respondents instead faulted FMCSA for failing to study the environmental effects of "trucks crossing the border." C.A. Br. of Public Citizen, et al. 32.

As respondents have conceded in this Court (Br. in Opp. 25 & n.5), they waited until their reply brief in the court of appeals to advance a secondary argument that FMCSA should have "cho[sen] amongst various [safety] options * * * to alleviate environmental effects" of new cross-border operations by Mexican trucks. See C.A. Reply Br. of Public Citizen, et al. 13-15, 21. Although that argument addressed the substance of FMCSA's rulemakings, it was raised much too late to be considered in this case. See

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978) (parties challenging agency's environmental review under NEPA must "alert[] the agency to [their] position and contentions" in administrative proceedings); *Eberle* v. *City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (appellant may not raise new issues in reply brief).[11]

Revealingly, respondents have consistently relied on a report prepared by a firm called Sierra Research, Inc., which asserts that FMCSA's Proposed Action Alternative (under which the President would lift the moratorium on cross-border operations after FMCSA put its new Application and Safety Monitoring Rules in place) would have materially the same, supposedly harmful environmental effects as the No Action Alternative (under which—contrary to what actually was possible under the appropriations restriction of Section 350—the President would lift the moratorium and FMCSA, without issuing the new Application and Safety Monitoring Rules, would process applications from Mexican carriers under the then-existing rules that did not satisfy Section 350). See J.A. 301-303, 312. If the No Action Alternative and the Proposed Action Alternative are equally objectionable to respondents, then respondents must be challenging the lifting of the moratorium, not FMCSA's proposed rules. The

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[11] At the petition stage, respondents invoked (Br. in Opp. 25 n.5) the Ninth Circuit's practice of considering an appellant's arguments concerning issues the appellee injected into the case. See *United States* v. *Franco-Lopez*, 312 F.3d 984, 993 n.6 (9th Cir. 2002). But respondents did not identify anything in the government's appellate brief that supposedly raised, on their behalf, this alternative claim of agency error. Moreover, even if the Ninth Circuit's practice concerning arguments made in a reply brief is appropriate where (unlike here) the predicate for its invocation is present, that would not excuse respondents' previous procedural default, as a matter of administrative law under *Vermont Yankee*, in failing to present this issue to FMCSA.

President, however, has sole authority to decide whether to allow Mexican trucks to serve cross-border routes, and his decision is not subject to the EIS provisions of NEPA.[12]

B. The President's Lifting Of The Trade Moratorium Is Not An "Effect" Of FMCSA's Safety Rulemakings Under NEPA

The court of appeals determined (Pet. App. 28a-43a) and respondents argue (Br. in Opp. 18-21) that, even if the border-opening decision *itself* is exempt from NEPA, NEPA required FMCSA to attribute the *effects* of the border opening to its own safety regulations. The court of appeals reasoned principally that the implementing regulations promulgated by CEQ require FMCSA to study the environmental consequences of the President's action because his lifting of the moratorium on cross-border operations was "reasonably foreseeable" following FMCSA's rulemaking. Pet. App. 31a. For their part, respondents focus particularly on the appropriations restrictions of Section 350, asserting that the environmental consequences of opening the border are attributable to FMCSA because, as long as Section 350 remains in place, issuance of the new Application and Safety Monitoring Rules is a "prerequisite" to actually implementing the President's decision. Br. in Opp. 18. Neither rationale supports the court of appeals' holding.

1. FMCSA's Safety Rulemakings Did Not "Cause" The Alleged Environmental Effects Of The President's Action To Allow Cross-Border Operations

Under the CEQ regulations, the environmental "effects" that can trigger the EIS requirement, see 42 U.S.C.

[12] Another analysis on which respondents principally rely likewise addressed "emissions increases with Mexican heavy-duty diesel trucks operating in California and elsewhere in the U.S.," not the effects of the particular provisions of FMCSA's safety regulations. J.A. 387.

4332(2)(C)(ii), include "[d]irect effects, which are caused by the action and occur at the same time and place," 40 C.F.R. 1508.8(a), and "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," 40 C.F.R. 1508.8(b). Under either the "direct effects" definition or the "indirect effects" definition, the effects associated with an agency action trigger NEPA obligations only if they are "caused by the action."

FMCSA was well within the bounds of its discretion in treating the President's action to open the border as "an intervening event" pertinent to its environmental assessment of the proposed regulations, J.A. 56, rather than an "effect" of the regulations themselves. The Application and Safety Monitoring Rules will not "cause" pollution from Mexican trucks and buses within the meaning of the CEQ regulations. FMCSA promulgated its safety regulations after the announcement of the President's intention to terminate the moratorium on new grants of cross-border operating authority, see Pet. App. 10a, 20a, 22a, and "in anticipation" of that action, *id.* at 54a. Thus, far from "causing" the effects of the President's decision to lift the moratorium, FMCSA's promulgation of new regulations was *caused by* the announcement of the President's intention to lift the moratorium.

Moreover, even after FMCSA promulgated its regulations, it remained possible that "political, diplomatic, military, or economic" developments "could have changed the President's mind" about lifting the moratorium. Pet. App. 22a. If the President had changed his mind, there would have been no significant increase in cross-border operations by Mexican carriers following FMCSA's promulgation of its safety rules. To hold that FMCSA's rulemaking "caused" the effects of the President's decision would be to require agencies that implement determinations of the President to

treat their own subordinate actions as the cause of Presidential decisions over which they have no control.[13]

2. *Congress's Enactment Of Section 350 Did Not Require FMCSA To Study The Effects Of Lifting The Moratorium*

a. Section 350 of the 2002 Appropriations Act does not render FMCSA responsible for the President's decision to allow cross-border operations by new Mexican carriers. That legislation made the adoption by FMCSA of certain safety-related requirements—concerning such matters as the contents of mandatory safety inspections, safety compliance reviews of Mexican motor carriers, and driver qualifications—a precondition to FMCSA's own review and processing of applications by Mexican carriers for cross-border operating authority. See App., *infra*, 12a-20a. Nothing in Section 350 gave FMCSA authority over the threshold determination whether Mexican motor carriers as a class should be allowed to conduct cross-border operations in the United States, or authorized FMCSA to tailor its safety regulations for Mexican carriers to accomplish trade or environmental objectives. To the contrary, Section 350 left intact the mandate of 49 U.S.C. 13902(a), which obligates FMCSA to grant operating authority to all motor carriers—including Mexican motor carriers—that are "willing and able to comply with" applicable safety and financial-responsibility requirements. FMCSA therefore was powerless even after the enactment of Section 350 to advance environmental objectives at the expense of its statutory mandates, or to

[13] The practical dependence of FMCSA's new safety requirements on the President's trade action distinguishes this case from one involving indirect effects that are related to a change in the physical environment that genuinely is brought about by the agency's action, such as changes in land use that are induced by the construction of a federal highway. See 40 C.F.R. 1508.8(b).

delay the promulgation of safety rules for the purpose of limiting its grants of operating authority to motor carriers that otherwise would be eligible to receive such authority.

Contrary to respondents' argument at the petition stage (Br. in Opp. 11-14, 20-21), moreover, Congress's re-enactment of Section 350, following the court of appeals' decision striking down the Application and Safety Monitoring Rules, says nothing about the proper application of NEPA in these circumstances. Section 350 did not amend the environmental or motor carrier safety laws, or address the Ninth Circuit's decision. The reasons identified in the legislative history for extending Section 350 beyond Fiscal Year 2002 involved only safety issues, not environmental concerns about cross-border operations by Mexican carriers. See S. Rep. No. 224, 107th Cong., 2d Sess. 84-85 (2002) (discussing Fiscal Year 2003 extension); see also S. Rep. No. 146, 108th Cong., 1st Sess. 69-70 (2003) (discussing satisfaction of Section 350's requirements in connection with Fiscal Year 2004 extension); H.R. Rep. No. 243, 108th Cong., 1st Sess. 81 (2003) (same). With respect to the legal issues in this case, Congress has been entirely silent. As respondents concede, such legislative inaction "has generally been rejected as an interpretive aid." Br. in Opp. 13 (citing *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994)).

b. Despite those considerations, the court of appeals suggested (Pet. App. 18a-23a, 31a) and respondents contend (see Br. in Opp. 18-20) that by requiring FMCSA to issue new safety rules before it could process applications by Mexican carriers for authority to conduct cross-border operations, Section 350 created a "but for" relationship between FMCSA's safety rulemaking and the possible environmental effects of allowing cross-border operations by Mexican motor carriers, and thereby triggered a NEPA obligation to conduct a full environmental evaluation of those effects. A bare "but for" relationship, however, is not sufficient even in

the ordinary case to establish the requisite causal relationship under NEPA between an agency action and possible environmental effects, and it certainly does not suffice here, given the narrow focus of Section 350 on FMCSA's safety rules and the supervening cause of the President's foreign affairs action.

The Court explained in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), that "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [42 U.S.C. 4332]." *Id.* at 774. The causation problem in *Metropolitan Edison* involved a long "causal chain" between the agency's action affecting the physical environment (possible re-starting of the Three Mile Island nuclear power plant) and the claimed psychological harm from that action. See *id.* at 774-775. The Court stated more generally, however, that NEPA requires "a reasonably close causal relationship," and that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make [the agency] responsible for an effect and those that do not." *Id.* at 774 & n.7.

Here, the clear division of responsibility between the President and FMCSA under the Constitution and the relevant statutory provisions "draw[s] a manageable line" between the effects for which FMCSA is responsible under NEPA and those for which it is not responsible. *Metropolitan Edison*, 460 U.S. at 774 n.7. FMCSA's actions within its sphere of safety regulation will not work any "change in the physical environment" (*id.* at 774) that is relevant to respondents' legal challenge. At a minimum, it was not arbitrary or capricious for FMCSA to focus its EA in accordance with those principles.

Nothing in Section 350 affects that conclusion. Section 350, which is entitled "Safety of Cross-Border Trucking

Between United States and Mexico," 115 Stat. 864, is directed solely to the safety-related responsibilities of FMCSA, requiring FMCSA to adopt additional safety criteria before it processes applications from Mexican carriers. Section 350 is predicated on the assumption that the trade moratorium would be modified by the President in accordance with NAFTA, and thus addresses only the manner in which the President's decision will be implemented. FMCSA reasonably construed Section 350 not to require it to step back from the immediate safety-related task at hand and evaluate under NEPA the environmental effects of allowing cross-border operations by Mexican carriers as a class.

Indeed, given the President's action in November 2002 to lift the moratorium on new grants of cross-border operating authority (which both FMCSA and the drafters of Section 350 reasonably anticipated, and which was an historical fact by the time of the court of appeals' decision, see Pet. App. 20a, 22a), FMCSA lacks discretion to refrain from meeting the safety-related requirements of Section 350. In light of the President's foreign trade action, 49 U.S.C. 13902(a)(1) effectively requires FMCSA to promulgate regulations that satisfy Section 350, so that the agency can fulfill its statutory mandate of processing applications by Mexican carriers that are "willing and able" to comply with federal safety, fitness, and financial-responsibility requirements.

c. The error in the court of appeals' and respondents' "but for" analysis is underscored by the fact that neither of the legislative purposes underlying NEPA's EIS requirement would be served by requiring FMCSA to study further the environmental impacts of lifting the moratorium on cross-border operations by Mexican carriers. See *Metropolitan Edison*, 460 U.S. at 774 n.7. The first purpose underlying the EIS requirement—ensuring that "in reaching its decision," an agency "will carefully consider[] detailed informa-

tion concerning significant environmental impacts," *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), would not be served because FMCSA lacks any authority or rulemaking discretion relevant to retaining or lifting the trade moratorium.

Preparation of an EIS in this case also is not indicated by the second purpose of the statutory EIS requirement, which is providing relevant information "to the larger audience that may also play a role in both the decisionmaking process and the implementation of th[e agency's] decision." *Robertson*, 490 U.S. at 349. The relevant decision was the President's determination to allow new grants of cross-border operating authority in light of "the obligations of the United States under a trade agreement or * * * United States transportation policy." 49 U.S.C. 13902(c)(3); see Pet. App. 232a-234a. In making NEPA applicable only to federal agencies, Congress exempted the President's decision-making from the requirements of NEPA. Congress's objectives in enacting NEPA do not support a requirement that FMCSA prepare an EIS to inform any action of the President—much less an action that already had been taken by the time the court of appeals ruled—because Congress categorically determined that the burdens of preparing EISs in connection with actions of the President are *not* justified.[14]

[14] The fact that the President had formally lifted the moratorium on cross-border operations by the time of the court of appeals' decision highlights the further point that, even if the court of appeals was correct that FMCSA should have prepared an EIS *before* the President acted (which it was not), it does not follow that FMCSA must prepare an EIS under current conditions. More generally, even under the court of appeals' incorrect understanding of NEPA and the CAA, it was error for the court of appeals to require FMCSA to prepare an EIS and a CAA conformity review, rather than identifying the particular errors in FMCSA's analysis that the court of appeals believed to exist and then remanding to FMCSA for a determination whether an EIS and conformity review are required. See *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) (discussing "the basic legal principles that govern remand" following court of appeals' determination of agency error).

d. As applied in this case, the "but for" approach of the court of appeals also contravenes the "rule of reason" that is inherent in NEPA and CEQ's implementing regulations. See *Marsh*, 490 U.S. at 373-374; cf. *National Wildlife Fed'n* v. *Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981) ("Agency decisions setting limits to the scope of their environmental review are * * * rightfully guided by the so-called 'rule of reason.'"). In this context, reasonableness must be informed by the structure of our Government under the Constitution and the allocation of responsibilities under the applicable statutory scheme. No rule of reason inherent in NEPA could require FMCSA, a subordinate agency of the Executive Branch, to prepare an EIS pertaining to either (1) a decision committed to the President, who is not covered by NEPA, or (2) hypothetical action by FMCSA, in contravention of both 49 U.S.C. 13902(a)(1) and the President's determination to open the border, effectively to refuse to process and grant applications filed by eligible Mexican carriers that seek to provide cross-border services.

The EIS process ordered by the court of appeals would further delay the eventual removal of a trade moratorium that is harming consumers and causing conflict with the government of Mexico. See Pet. 24-26. There also is a substantial expense associated with preparing an EIS that addresses the border opening.[15] Those substantial costs are not justified by any commensurate benefit in "help[ing] public officials make decisions." 40 C.F.R. 1500.1(c) (de-

[15] FMCSA has entered into a contract with a vendor for the preparation of the EIS and CAA analysis mandated by the court of appeals. DOT advises that it now expects its total payments under the contract to be at least $2.25 million, if that analysis is required.

scribing purposes of NEPA). FMCSA has no responsibility for the trade action to which the EIS would relate.[16]

Numerous other lines of authority point to the same conclusion. In *Aberdeen & Rockfish Railroad* v. *SCRAP*, 422 U.S. 289 (1975), for example, this Court made clear that an agency is not required to prepare an EIS if the EIS would be superfluous and serve "no purpose" in light of the NEPA scheme as a whole. *Id.* at 325. CEQ's implementing regulations are to the same effect, stating that "NEPA documents must concentrate on the issues that are truly significant to the action in question" and should not "amass[] needless detail" concerning matters that are insignificant to the particular agency action. 40 C.F.R. 1500.l(b); see 40 C.F.R. 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."). Requiring FMCSA to spend millions of dollars to study the potential effects of a decision that has already been made and over which FMCSA has no control would serve "no purpose" and constitute nothing more than "amassing needless detail." NEPA does not require such a pointless exercise.

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[16] As the court of appeals observed (Pet. App. 31a), NEPA requires federal agencies to comply with the EIS requirement "to the fullest extent possible." 42 U.S.C. 4332. That does not support respondents' position in this case, however. Congress included that language in NEPA to "make it clear that each agency of the Federal Government *shall* comply with the directives set out in [42 U.S.C. 4332(2)(C)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance * * * impossible." *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 787-788 (1976) (quoting 115 Cong. Rec. 39,703 (1969)). There is no dispute here that FMCSA must apply NEPA. Similarly, the court of appeals' decision is not bolstered by Congress's statutory clarification that NAFTA implementation is subject to the Nation's environmental laws. 19 U.S.C. 3312(a); see Pet. App. 7a-8a. The issue is what NEPA requires, not whether NEPA applies to NAFTA implementation.

Moreover, in a uniform line of cases involving ministerial or otherwise nondiscretionary agency actions, the courts of appeals have recognized that agency actions that do not entail a significant exercise of discretion do not give rise to NEPA obligations, because "the information that NEPA provides can have no effect on the agency's actions." *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001); see, *e.g.*, *City of New York* v. *Minet[]a*, 262 F.3d 169, 177-178 (2d Cir. 2001); *Sac & Fox Nation* v. *Norton*, 240 F.3d 1250 (10th Cir. 2001), cert. denied, 534 U.S. 1078 (2002); *American Airlines, Inc.* v. *Department of Transp.*, 202 F.3d 788, 803 (5th Cir.), cert. denied, 530 U.S. 1274 and 1284 (2000); *Aircraft Owners & Pilots Ass'n* v. *Hinson*, 102 F.3d 1421, 1425-1426 (7th Cir. 1996); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995); *Goos* v. *ICC*, 911 F.2d 1283, 1296 (8th Cir. 1990); *Milo Community Hosp.* v. *Weinberger*, 525 F.2d 144, 148 (1st Cir. 1975). In this case, the ambit of FMCSA's discretion was confined to fashioning safety standards for Mexican carriers that would satisfy Section 350 and FMCSA's other statutory mandates, on the assumption that the President would lift the moratorium. FMCSA conducted its environmental-effects analysis of the Application and Safety Monitoring rules in that context and within the confines of its statutory authority. FMSCA did not have discretion to countermand any determination by the President that Mexican carriers would no longer be barred, and it accordingly had no obligation under NEPA to conduct an environmental analysis as if that were an available option.

Finally, and in addition to its inconsistency with general principles underlying NEPA, the court of appeals' application of NEPA in this case frustrates the operation of the statutory provision that expressly grants the President discretion to remove or modify the moratorium on cross-border operations by Mexican motor carriers. Cf. *Crosby*,

530 U.S. at 374-377. Section 13902(c)(5) of Title 49 generally requires the President to publish his determinations to alter the moratorium in order to allow public comment. But if the President "determines that expeditious action is required," the notice and comment requirement does not apply. 49 U.S.C. 13902(c)(5). In this case, the President determined under Section 13902(c)(5) that the moratorium needed to be modified expeditiously to comply with NAFTA and, accordingly, the public comment requirement did not apply. Pet. App. 233a. The court of appeals' remand order effectively overrides the President's determination under Section 13902(c)(5) that a public proceeding on the decision to open the border, pursuant to NAFTA, is not warranted.

3. FMCSA Was Not Required To Undertake A "Cumulative Impact" Analysis Addressing The President's Border-Opening Decision

The court of appeals also erred in relying (Pet. App. 30a-31a) on CEQ regulations addressing so-called "cumulative impacts." The regulations provide that agencies must consider cumulative impacts, in addition to the direct and indirect effects of a proposed action, in evaluating the effects of the agency action. 40 C.F.R. 1508.25(c)(3), 1508.27(b)(7); see *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 106-107 (1983) ("NEPA requires an EIS to disclose the significant * * * cumulative consequences of the environmental impact of a proposed action"). The regulations define "[c]umulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. 1508.7.

CEQ's "cumulative impact" rules obligate agencies to consider the environmental effects of their actions in con-

text—*i.e.*, in light of "other past, present, or reasonably foreseeable future actions" of the agency itself or other actors. 40 C.F.R. 1508.7. FMCSA therefore was required to consider the effects of its Application and Safety Monitoring Rules in light of the President's foreseeable modification of the trade moratorium. It does not follow, however, that FMCSA had to treat the President's trade action as its own for purposes of NEPA analysis. Just the opposite is true. The "cumulative impact" that FMCSA had to consider involved the "incremental impact" of the safety rules themselves, in the context of the President's border-opening decision and other relevant circumstances. 40 C.F.R. 1508.7. Fulfilling that responsibility, FMCSA reasonably determined in the EA that its safety regulations would not result in a cumulatively significant impact on air quality in the only scenario in which they would have any consequential effect—namely, upon removal of the moratorium on cross-border operations—because (1) the only increased emissions resulting from the regulations would be the "negligible" inspection-related emissions, and (2) the new safety regulations might actually reduce emissions insofar as they could lower the number of Mexican trucks conducting cross-border operations in the United States. J.A. 166-167.

The court of appeals' misapplication of CEQ's "cumulative impact" rules is clearly revealed in its conclusion that it was "illogical" (Pet. App. 37a) for FMCSA to consider the possibility that the new safety rules might reduce the number of Mexican trucks operating in the United States and have an incidental air-quality benefit, see p. 12, *supra*, while also determining that any increase in air pollution associated with the President's border opening decision did not have to be studied in an EIS. Under CEQ's regulations, FMCSA had to study "the incremental impact of the action" it proposed to undertake. 40 C.F.R. 1508.7. The effects of the proposed safety regulations therefore had to be (and were)

considered in light of the anticipated termination of the prohibition on new grants of cross-border operating authority, but the effects of that trade action did not themselves have to be the subject of an EIS prepared by FMCSA because the lifting of the moratorium was not an action of FMCSA. FMCSA could properly take that supervening action by the President, and its environmental effects, as a given in determining what safety standards should be imposed when the President lifted the moratorium.

* * * * *

The core question in considering whether to prepare an EIS is whether the agency's proposed action would "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C). Here, FMCSA reasonably determined, after the exhaustive analysis described in the EA, that the Application and Safety Monitoring Rules will not have any significant environmental effect. It was not arbitrary or capricious for FMCSA to decline to undertake the massive environmental review suggested by respondents and ordered by the court of appeals.

II. FMCSA'S SAFETY RULEMAKINGS ARE NOT SUBJECT TO THE CONFORMITY-REVIEW REQUIREMENTS OF THE CLEAN AIR ACT

Under the Clean Air Act and implementing regulations promulgated by the Environmental Protection Agency pursuant to 42 U.S.C. 7506(c)(4), a federal "department, agency or instrumentality" generally may not "engage in, support in any way or provide financial assistance for, license or permit, or approve any activity" that violates an applicable State air-quality implementation plan. 42 U.S.C. 7506(c)(1); 40 C.F.R. 93.150.[17] In its rulemaking decisions, FMCSA determined

[17] The FMCSA safety rulemakings in this case are subject to the conformity-review provisions of 40 C.F.R. Part 93, Subpart B, not the special provisions governing conformity reviews for certain transportation projects, 40 C.F.R. Pt. 51, Subpt. T. See 42 U.S.C. 7506(c)(2); 40 C.F.R. 93.153(a).

that emissions attributable to the Application and Safety Monitoring Rules (*i.e.*, emissions from increased roadside inspections of Mexican trucks) would be below threshold emissions levels set by EPA and a full conformity review under the Clean Air Act therefore was not required. Pet. App. 65a-66a, 155a. The court of appeals concluded that FMCSA must prepare a conformity determination that addresses the border opening in order to satisfy the CAA and EPA's implementing regulations. *Id.* at 46a-52a. The court's CAA analysis rested on essentially the same reasoning as its NEPA analysis, and it is similarly incorrect.

A. Presidential Action Is Exempt From The Conformity-Review Requirement

Just as the President is not a "federal agency" under NEPA and the APA, see Point I.A.1., *supra*, he is not a "department, agency, or instrumentality of the Federal Government" under the CAA and, therefore, the Presidential action to open the border is exempt from the conformity-review requirement. Actions of the President have never been held subject to the conformity-review requirement. Furthermore, the terms "department," "agency," and "instrumentality" are used elsewhere in the CAA in contexts that make clear that they do not encompass individual federal officers, much less the President himself. See 42 U.S.C. 7418(a) (imposing on "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government * * * and each officer, agent, or employee thereof" a duty to comply with federal and state air pollution laws), 7418(b) (allowing President to "exempt any emission source of any department, agency, or instrumentality in the executive branch"), 7604(e) (preserv-

ing citizen enforcement rights "against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof").

If the language of the CAA did not on its face establish the President's exempt status, the same conclusion would be compelled in any event by *Franklin*, which provides that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, * * * textual silence is not enough" to subject discretionary Presidential decision-making to procedural requirements that are enforceable by the courts. *Franklin*, 505 U.S. at 800-801. Furthermore, although EPA's implementing regulations do not specifically address the President's status under Section 7506(c), those regulations use the term "federal agency"—which does not naturally include the President—to encompass the universe of all covered departments, agencies, and instrumentalities of the federal government. 40 C.F.R. 93.152 (definition of "[f]ederal [a]gency"). Similarly, in promulgating its implementing rules, EPA explained that the term "instrumentality," as used in Section 7506(c), serves merely to "includ[e] those Federal entities which are not specifically linked to a 'department' or 'agency,' including, for example, an independent Federal Commission." *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 13,838 (1993).

For these reasons, the conformity-review requirement does not apply to actions of the President. That rule is reinforced by the exemption of Presidential decision-making from the judicial review provisions of the APA, which are the basis for the instant litigation. See *Franklin*, 505 U.S. at 801.

B. Under EPA's Implementing Rules, The Air-Quality Effects Of Lifting The Trade Moratorium Are Not Emissions Associated With FMCSA's Safety Rulemakings

EPA's rules implementing the conformity-review requirement provide that "a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed" the threshold levels established by EPA. 40 C.F.R. 93.153(b). "Direct emissions" are defined as those covered emissions "that are caused or initiated by the Federal action and occur at the same time and place as the action." 40 C.F.R. 93.152. The term "indirect emissions" means covered emissions that:

> (1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably forseeable; and
>
> (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

40 C.F.R. 93.152.

In discussing those definitions, the court of appeals relied (Pet. App. 49a) on EPA's further clarification that "*[c]aused by*, as used in the terms 'direct emissions' and 'indirect emissions,' means emissions that would not otherwise occur in the absence of the Federal action," 40 C.F.R. 93.152. Echoing its earlier NEPA analysis, the court erroneously concluded that a "but for" relationship between an agency action and particular air emissions makes those emissions attributable to the agency action for purposes of the CAA's conformity-review requirement. Pet. App. 47a, 49a. The court overlooked that any motor carrier emissions associated with lifting the moratorium on cross-border operations were

not cognizable in FMCSA's conformity review in any event, because they were excluded by *other* elements of EPA's definitions of "direct emissions" and "indirect emissions."

Vehicle emissions that result from allowing Mexican motor carriers to apply for operating authority to provide cross-border services are not "direct emissions" of FMCSA's regulations because they do not "occur at the same time and place" as FMCSA's safety program. 40 C.F.R. 93.152. Nor do the truck emissions qualify as "indirect emissions" under EPA's definition; they are not emissions that FMCSA "can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." 40 C.F.R. 93.152. FMCSA has no control over the President's decision to lift the moratorium on cross-border operations by Mexican motor carriers, no significant ability to control the emissions of Mexican motor carriers engaged in cross-border operations, and no "continuing program responsibility" for those emissions.

When it issued its regulations implementing the conformity-review requirement, EPA determined that it was not "reasonable to conclude," under 42 U.S.C. 7506(c)(1), that a Federal agency "supports" activities or emissions over which the agency has no practicable control "based on the mere fact that, if one inspects the 'causal' chain of events, the activity or emissions can be described as being a 'reasonably foreseeable' result of the agency's actions." *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214, 63,220 (1993). That interpretation, which is entitled to judicial deference and the D.C. Circuit has upheld, see *Environmental Def. Fund, Inc.* v. *EPA*, 82 F.3d 451, 464 (per curiam), amended,

92 F.3d 1209 (D.C. Cir. 1996), compels reversal of the court of appeals' ruling on the CAA issue.[18]

* * * * *

The practical harm of the court of appeals' incorrect CAA ruling may be even greater than the harm of its NEPA ruling. The conformity analysis contemplated by the court of appeals would require FMCSA to examine the potential impact of lifting the moratorium in scores of air quality control regions throughout the United States. If FMCSA were required to complete such an analysis, and if it concluded that the President's decision to open United States markets to Mexican carriers will cause an increase in air emissions above regulatory thresholds in any of the studied regions, then FMCSA would not be able to promulgate its safety rules—and the President's effort to bring the United States into compliance with its obligations under NAFTA and the arbitration decision of February 2001 would be further delayed—unless "conformity" to state air-quality plans somehow could be achieved. 42 U.S.C. 7506(c)(1)(B). Yet FMCSA has no authority to undo or alter the President's trade decision, or to regulate corresponding emissions. The obvious gap between the broad, foreign policy-related remedy respondents seek and FMCSA's very limited ability

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[18] In addition to its incorrect determination that the EA's "distinction between the effects of the [safety] regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry" is "illusory," the court of appeals expressed the view that "methodological flaws" in the EA, such as FMCSA's failure to analyze the truck emissions "on a local or regional basis," compromised the conformity analysis. Pet. App. 47a. Because FMCSA was not required to consider the truck emissions resulting from cross-border operations in its CAA conformity review at all, methodological issues concerning how the truck emissions should be analyzed cannot be a basis for overturning the agency's conformity determination.

to address CAA issues through its safety rulemakings reinforces the conclusion that FMCSA's determination of the proper scope of its CAA review was not arbitrary or capricious.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. Administrative Procedure Act

Section 706 of Title 5 of the United States Code provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party,

and due account shall be taken of the rule of prejudicial error.

2. National Environmental Policy Act

a. Section 4332 of Title 42 of the United States Code provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]

b. Section 1508.7 of Title 40 of the Code of Federal Regulations provides:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

c. Section 1508.8 of Title 40 of the Code of Federal Regulations provides:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

d. Section 1508.12 of Title 40 of the Code of Federal Regulations provides:

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

e. Section 1508.25 of Title 40 of the Code of Federal Regulations provides:

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

3. Clean Air Act

a. Section 7506(c)(1) of Title 42 of the United States Code provides:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

b. Section 93.150 of Title 40 of the Code of Federal Regulations provides:

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to January 31, 1994, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

c. Section 93.152 of Title 40 of the Code of Federal Regulations provides in pertinent part:

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

* * * * *

Indirect emissions means those emissions of a criteria pollutant or its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

4. ICC Termination Act of 1995, Pub. L. No. 104-88, as Amended

Section 13902 of Title 49 of the United States Code provides in pertinent part:

(a) MOTOR CARRIER GENERALLY.—

(1) IN GENERAL.—Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with—

(A) this part and the applicable regulations of the Secretary and the Board;

(B) any safety regulations imposed by the Secretary and the safety fitness requirements established by the Secretary under section 31144; and

(C) the minimum financial responsibility requirements established by the Secretary pursuant to sections 13906 and 31138.

(2) CONSIDERATION OF EVIDENCE; FINDINGS.—The Secretary shall consider and, to the extent applicable, make findings on, any evidence demonstrating that the registrant is unable to comply with the requirements of subparagraph (A), (B), or (C) of paragraph (1).

(3) WITHHOLDING.—If the Secretary determines that any registrant under this section does not meet the requirements of paragraph (1), the Secretary shall withhold registration.

(4) LIMITATION ON COMPLAINTS.—The Secretary may hear a complaint from any person concerning a registration under this subsection only on the ground that the registrant

fails or will fail to comply with this part, the applicable regulations of the Secretary and the Board, the safety regulations of the Secretary, or the safety fitness or minimum financial responsibility requirements of paragraph (1) of this subsection.

* * * * *

(c) RESTRICTIONS ON MOTOR CARRIERS DOMICILED IN OR OWNED OR CONTROLLED BY NATIONALS OF A CONTIGUOUS FOREIGN COUNTRY.—

(1) PREVENTION OF DISCRIMINATORY PRACTICES. —If the President, or the delegate thereof, determines that an act, policy, or practice of a foreign country contiguous to the United States, or any political subdivision or any instrumentality of any such country is unreasonable or discriminatory and burdens or restricts United States transportation companies providing, or seeking to proide, motor carrier transportation to, from, or within such foreign country, the President or such delegate may–

(A) seek elimination of such practices through consultations; or

(B) notwithstanding any other provision of law, suspend, modify, amend, condition, or restrict operations, including geographical restriction of operations, in the United States by motor carriers of property or passengers domiciled in such foreign country or owned or controlled by persons of such foreign country.

(2) EQUALIZATION OF TREATMENT.—Any action taken under paragraph (1)(A) to eliminate an act, policy, or practice shall be so devised so as to equal to the extent possible the burdens or restrictions imposed by

such foreign country on United States transportation companies.

(3) REMOVAL OR MODIFICATION.—The President, or the delegate thereof, may remove or modify in whole or in part any action taken under paragraph (1)(A) if the President or such delegate determines that such removal or modification is consistent with the obligations of the United States under a trade agreement or with United States transportation policy.

(4) PROTECTION OF EXISTING OPERATIONS.— Unless and until the President, or the delegate thereof, makes a determination under paragraph (1) or (3), nothing in this subsection shall affect–

(A) operations of motor carriers of property or passengers domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country permitted in the commercial zones along the United States-Mexico border as such zones were defined on December 31, 1995; or

(B) any existing restrictions on operations of motor carriers of property or passengers domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country or any modifications thereof pursuant to section 6 of the Bus Regulatory Reform Act of 1982.

(5) PUBLICATION; COMMENT.—Unless the President, or the delegate thereof, determines that expeditious action is required, the President shall publish in the Federal Register any determination under paragraph (1) or (3), together with a description of the facts on which such a determination is based and any proposed action to be taken pursuant to paragraph

(1)(B) or (3), and provide an opportunity for public comment.

(6) DELEGATION TO SECRETARY.—The President may delegate any or all authority under this subsection to the Secretary, who shall consult with other agencies as appropriate. In accordance with the directions of the President, the Secretary may issue regulations to enforce this subsection.

(7) CIVIL ACTIONS.—Either the Secretary or the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this subsection or a regulation prescribed or order issued under this subsection. The court may award appropriate relief, including injunctive relief.

(8) LIMITATION ON STATUTORY CONSTRUCTION. —This subsection shall not be construed as affecting the requirement for all foreign motor carriers and foreign motor private carriers operating in the United States to comply with all applicable laws and regulations pertaining to fitness, safety of operations, financial responsibility, and taxes imposed by section 4481 of the Internal Revenue Code of 1986.

5. Department of Transportation and Related Agencies Act, 2002

Section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864, provides in pertinent part:

SAFETY OF CROSS-BORDER TRUCKING BETWEEN UNITED STATES AND MEXICO. (a) No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the

United States-Mexico border until the Federal Motor Carrier Safety Administration—

(1)(A) requires a safety examination of such motor carrier to be performed before the carrier is granted conditional operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border;

(B) requires the safety examination to include—

(i) verification of available performance data and safety management programs;

(ii) verification of a drug and alcohol testing program consistent with part 40 of title 49, Code of Federal Regulations;

(iii) verification of that motor carrier's system of compliance with hours- of-service rules, including hours-of-service records;

(iv) verification of proof of insurance;

(v) a review of available data concerning that motor carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations;

(vi) an inspection of that Mexican motor carrier's commercial vehicles to be used under such operating authority, if any such commercial vehicles have not received a decal from the inspection required in subsection (a)(5);

(vii) an evaluation of that motor carrier's safety inspection, maintenance, and repair facilities or man-

agement systems, including verification of records of periodic vehicle inspections;

(viii) verification of drivers' qualifications, including a confirmation of the validity of the Licencia de Federal de Conductor of each driver of that motor carrier who will be operating under such authority; and

(ix) an interview with officials of that motor carrier to review safety management controls and evaluate any written safety oversight policies and practices.

(C) requires that—

(i) Mexican motor carriers with three or fewer commercial vehicles need not undergo on-site safety examination; however 50 percent of all safety examinations of all Mexican motor carriers shall be conducted onsite; and

(ii) such on-site inspections shall cover at least 50 percent of estimated truck traffic in any year.

(2) requires a full safety compliance review of the carrier consistent with the safety fitness evaluation procedures set forth in part 385 of title 49, Code of Federal Regulations, and gives the motor carrier a satisfactory rating, before the carrier is granted permanent operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border, and requires that any such safety compliance review take place within 18 months of that motor carrier being granted conditional operating authority, provided that—

(A) Mexican motor carriers with three or fewer commercial vehicles need not undergo onsite compliance review; however 50 percent of all compliance reviews of all Mexican motor carriers shall be conducted on-site; and

(B) any Mexican motor carrier with 4 or more commercial vehicles that did not undergo an on-site safety exam under (a)(1)(C), shall undergo an on-site safety compliance review under this section.

(3) requires Federal and State inspectors to verify electronically the status and validity of the license of each driver of a Mexican motor carrier commercial vehicle crossing the border;

(A) for every such vehicle carrying a placardable quantity of hazardous materials;

(B) whenever the inspection required in subsection (a)(5) is performed; and

(C) randomly for other Mexican motor carrier commercial vehicles, but in no case less than 50 percent of all other such commercial vehicles.

(4) gives a distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours-of-service rules under part 395 of title 49, Code of Federal Regulations;

(5) requires, with the exception of Mexican motor carriers that have been granted permanent operating authority for three consecutive years—

(A) inspections of all commercial vehicles of Mexican motor carriers authorized, or seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border that do not display a valid Commercial Vehicle Safety Alliance inspection decal, by certified inspectors in accordance with the requirements for a Level I Inspection under the criteria of the North American Standard

Inspection (as defined in section 350.105 of title 49, Code of Federal Regulations), including examination of the driver, vehicle exterior and vehicle under-carriage;

(B) a Commercial Vehicle Safety Alliance decal to be affixed to each such commercial vehicle upon completion of the inspection required by clause (A) or a re-inspection if the vehicle has met the criteria for the Level I inspection; and

(C) that any such decal, when affixed, expire at the end of a period of not more than 90 days, but nothing in this paragraph shall be construed to preclude the Administration from requiring reinspection of a vehicle bearing a valid inspection decal or from requiring that such a decal be removed when a certified Federal or State inspector determines that such a vehicle has a safety violation subsequent to the inspection for which the decal was granted.

(6) requires State inspectors who detect violations of Federal motor carrier safety laws or regulations to enforce them or notify Federal authorities of such violations;

(7)(A) equips all United States-Mexico commercial border crossings with scales suitable for enforcement action; equips 5 of the 10 such crossings that have the highest volume of commercial vehicle traffic with weigh-in-motion (WIM) systems; ensures that the remaining 5 such border crossings are equipped within 12 months; requires inspectors to verify the weight of each Mexican motor carrier commercial vehicle entering the United States at said WIM equipped high volume border crossings; and

(B) initiates a study to determine which other crossings should also be equipped with weigh-in-motion systems;

(8) the Federal Motor Carrier Safety Administration has implemented a policy to ensure that no Mexican motor carrier will be granted authority to operate beyond United States municipalities and commercial zones on the United States- Mexico border unless that carrier provides proof of valid insurance with an insurance company licensed in the United States;

(9) requires commercial vehicles operated by a Mexican motor carrier to enter the United States only at commercial border crossings where and when a certified motor carrier safety inspector is on duty and where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of said inspections.

(10) publishes—

(A) interim final regulations under section 210(b) of the Motor Carrier Safety Improvement Act of 1999 (49 U.S.C. 31144 note) that establish minimum requirements for motor carriers, including foreign motor carriers, to ensure they are knowledgeable about Federal safety standards, that may include the administration of a proficiency examination;

(B) interim final regulations under section 31148 of title 49, United States Code, that implement measures to improve training and provide for the certification of motor carrier safety auditors;

(C) a policy under sections 218(a) and (b) of that Act (49 U.S.C. 31133 note) establishing standards for the determination of the appropriate number of Federal and State motor carrier inspectors for the United States-Mexico border;

(D) a policy under section 219(d) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor carriers from leasing vehicles to another carrier to transport products to the United States while the lessor is subject to a suspension, restriction, or limitation on its right to operate in the United States; and

(E) a policy under section 219(a) of that Act (49 U.S.C. 14901 note) that prohibits foreign motor carriers from operating in the United States that is found to have operated illegally in the United States.

(b) No vehicles owned or leased by a Mexican motor carrier and carrying hazardous materials in a placardable quantity may be permitted to operate beyond a United States municipality or commercial zone until the United States has completed an agreement with the Government of Mexico which ensures that drivers of such vehicles carrying such placardable quantities of hazardous materials meet substantially the same requirements as United States drivers carrying such materials.

(c) No vehicles owned or leased by a Mexican motor carrier may be permitted to operate beyond United States municipalities and commercial zones under conditional or permanent operating authority granted by the Federal Motor Carrier Safety Administration until—

(1) the Department of Transportation Inspector General conducts a comprehensive review of border operations within 180 days of enactment to verify that—

(A) all new inspector positions funded under this Act have been filled and the inspectors have been fully trained;

(B) each inspector conducting on-site safety compliance reviews in Mexico consistent with the safety fitness evaluation procedures set forth in part 385 of title 49, Code of Federal Regulations, is fully trained as a safety specialist;

(C) the requirement of subparagraph (a)(2) has not been met by transferring experienced inspectors from other parts of the United States to the United States-Mexico border, undermining the level of inspection coverage and safety elsewhere in the United States;

(D) the Federal Motor Carrier Safety Administration has implemented a policy to ensure compliance with hours-of-service rules under part 395 of title 49, Code of Federal Regulations, by Mexican motor carriers seeking authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border;

(E) the information infrastructure of the Mexican government is sufficiently accurate, accessible, and integrated with that of United States enforcement authorities to allow United States authorities to verify the status and validity of licenses, vehicle registrations, operating authority and insurance of Mexican motor carriers while operating in the United States, and that adequate telecommunications links exist at all United States-Mexico border crossings used by Mexican motor carrier commercial vehicles, and in all mobile enforcement units operating adjacent to the border, to ensure that licenses, vehicle registrations, operating authority and insurance information can be easily and quickly verified at border crossings or by mobile enforcement units;

(F) there is adequate capacity at each United States-Mexico border crossing used by Mexican motor carrier commercial vehicles to conduct a sufficient

number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of said inspections;

(G) there is an accessible database containing sufficiently comprehensive data to allow safety monitoring of all Mexican motor carriers that apply for authority to operate commercial vehicles beyond United States municipalities and commercial zones on the United States-Mexico border and the drivers of those vehicles; and

(H) measures are in place to enable United States law enforcement authorities to ensure the effective enforcement and monitoring of license revocation and licensing procedures of Mexican motor carriers.

(2) The Secretary of Transportation certifies in writing in a manner addressing the Inspector General's findings in paragraphs (c)(1)(A) through (c)(1)(H) of this section that the opening of the border does not pose an unacceptable safety risk to the American public.

(d) The Department of Transportation Inspector General shall conduct another review using the criteria in (c)(1)(A) through (c)(1)(H) consistent with paragraph (c) of this section, 180 days after the first review is completed, and at least annually thereafter.

(e) For purposes of this section, the term "Mexican motor carrier" shall be defined as a Mexico-domiciled motor carrier operating beyond United States municipalities and commercial zones on the United States-Mexico border.

(f) In addition to amounts otherwise made available in this Act, to be derived from the Highway Trust Fund, there is hereby appropriated to the Federal Motor Carrier Safety Administration, $25,866,000 for the salary, expense, and capital costs associated with the requirements of this section.

No. 03-358

(9)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether under the National Environmental Policy Act, 42 U.S.C. § 4332, agency action that Congress made a prerequisite to allowing Mexico-domiciled trucks to operate throughout the United States is subject to an Environmental Impact Statement that will disclose and evaluate the serious environmental effects caused by such trucking.

2. Whether under the conformity provision of the Clean Air Act, 42 U.S.C. § 7506(c)(1), that agency action requires an analysis into the extent to which permitting Mexico-domiciled trucks to operate throughout the United States will make it difficult for states to comply with federal air quality standards.

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PROVISIONS INVOLVED

In addition to the statutes and regulations in petitioners' appendix, respondents' appendix includes other relevant statutes and regulations.

STATEMENT

This action challenges the failure of the Federal Motor Carrier Safety Administration ("FMCSA"), in taking action that will allow thousands of Mexico-domiciled trucks to operate throughout the United States, to consider adequately the resulting environmental effects under the National Environmental Policy Act ("NEPA") and the Clean Air Act ("CAA"). Congress enacted legislation that, for fiscal year 2002 (and each year thereafter), required that no appropriated funds be used to process applications from Mexico-domiciled trucks to operate in the interior of the United States until FMCSA implemented standards governing those trucks. FMCSA attempted to establish certain of the standards mandated by Congress by promulgating rules, but did so improperly, without adequate attention to the serious environmental consequences that will flow from the introduction of thousands of Mexico-domiciled trucks into the United States.

The court of appeals agreed with respondents that allowing Mexico-domiciled trucks to travel into the interior of the United States ("cross-border trucking") presents serious environmental and public health problems, and petitioners do not contend otherwise. The court directed FMSCA—which has discretion to ameliorate the environmental effects—both to complete an Environmental Impact Statement under NEPA to assess the environmental effects of cross-border trucking and to perform a conformity analysis under the CAA to evaluate such effects on the ability of states with pollution problems to comply with federal air quality standards.

Nothing in this case interferes with the President's power, obtained via previous authorization from Congress, to lift a congressionally imposed moratorium on cross-border trucking. Despite petitioners' attempts to suggest otherwise, respondents have never challenged the President's action. To the extent the restriction on spending appropriated funds precludes cross-border trucking, even though the moratorium has been lifted, that limitation has been imposed by *Congress*, not the courts. This litigation challenges only FMCSA's failure to consider the environmental effects that will flow from its actions allowing Mexico-domiciled trucks to travel throughout the country. Petitioners do not and could not contest that Congress, with its broad authority under the Commerce Clause, may condition cross-border trucking on FMCSA's compliance with environmental and safety laws. This action simply seeks compliance with those laws.

Most strained is petitioners' suggestion that this case poses a constitutional question about the President's foreign affairs power. Pet. Cert. 13-14. Those powers are not challenged by respondents, nor are they implicated in this action. This case is solely about FMCSA's responsibility under generally applicable environmental laws to assess the environmental effects of its actions, specifically the effects that will be caused by the issuance of rules that will permit the entry of thousands of Mexico-domiciled trucks into the United States.

Congress has now repeatedly enacted legislation that forbids the expenditure of any federal funds to process applications by Mexico-domiciled trucks for authorization to operate throughout the United States until applicable FMCSA standards are in place. Not only did Congress enact such an appropriations restriction for fiscal year 2002, which triggered FMCSA's rulemaking, Congress *reenacted* the same provision for fiscal year 2003—*after* the court of appeals' ruling in this case—and again for fiscal year 2004. Congress did so for an unmistakable reason: to drive home Congress' intent that cross-border trucking should not take place until

FMSCA promulgates rules in full compliance with applicable environmental laws.

1. NEPA, 42 U.S.C. §§ 4321-70f, and the CAA, 42 U.S.C. §§ 7401-671q, are fundamental environmental statutes that impose requirements on all federal agencies in order to protect the environment and public health. *See generally* Pet. App. 3a-7a. In enacting NEPA, Congress required that federal agencies "shall . . . include in . . . proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" known as an Environmental Impact Statement ("EIS") with respect to "the environmental impact of the proposed action, . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. § 4332(2). The CAA requires each state to develop an implementation plan to comply with federal air quality standards. 42 U.S.C. § 7410(a). To ensure that the federal government would not interfere with state efforts to meet federal air standards, Congress required federal agencies to prepare a conformity analysis concerning the effects of their proposed actions on state air quality plans. *See* 42 U.S.C. § 7506(c)(1); 40 C.F.R. §§ 93.150(b), 93.154.

These NEPA and CAA provisions are background requirements that apply to all federal agency actions. The statutes do not distinguish between duties of an environmental agency and those of other agencies. Nor do these statutes—or the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-59, 701-06, which authorizes judicial review of final agency actions—excuse agencies from compliance with NEPA or the CAA when another actor, including the President, takes a separate action that may also affect the environment.

The ratification of NAFTA did nothing to alter federal agency obligations under NEPA and the CAA, or Congress' power to enact legislation protecting public health and safety. In the NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2037, 19 U.S.C. §§ 3301-473, Congress provided: "No

provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3312 (a)(1). Accordingly, NEPA and the CAA continue to constrain the actions of federal agencies just as those laws did before NAFTA.

2. For years before and after ratification of NAFTA, Congress and the President maintained a moratorium on the operation of Mexico-domiciled trucks within the United States, restricting operations to a narrow commercial zone along the border.[1]

a. In 1982, Congress enacted the Bus Regulatory Reform Act (Pub. L. No. 97-261, § 6(g), 96 Stat. 1102, 1107-08), by which "Congress imposed a two-year moratorium" on new authorizations for trucks domiciled in Mexico and Canada to travel into the United States. J.A. 49.[2] In Section 6(g) of the Act, Congress permitted the President to remove, modify, or extend the moratorium. The moratorium was quickly lifted for trucks domiciled in Canada. *See* Pet. App. 56a. With respect to Mexico-domiciled trucks, however, three Presidents exercised their authority under the 1982 Act to extend the moratorium through September 1996. *See* 49 U.S.C. § 13902 Memoranda of President; Pet. App. 9a & n.2.

Before the September 1996 extension of the moratorium expired, Congress enacted the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat.

[1] The moratorium did not apply to Mexico-domiciled trucks that operate within the "border zone," defined as "commercial zones adjacent to Mexico in Texas, New Mexico, Arizona, and California." J.A. 50; *see also id.* at 253; Pet. App. 56a-57a.

[2] This statute and others discussed below refer to "motor carriers," the broad definition of which encompasses trucks. *See* 49 U.S.C. §§ 13102(12), (14). Throughout, we refer to "trucks" rather than "motor carriers" because the former are the basis of this litigation.

803, 883, which leaves in place "any existing restrictions on operations of motor carriers . . . domiciled in any contiguous foreign country" unless the President takes one of two potential actions set forth by Congress: (i) the President may place restrictions on trucking operations based on "unreasonable or discriminatory" practices placed on United States trucks by Canada or Mexico, and (ii) the President may remove or modify restrictions if he determines such action "is consistent with the obligations of the United States under a trade agreement or with United States transportation policy." 49 U.S.C. §§ 13902(c)(1), (3), (4). This litigation does not challenge the President's authority to modify or lift the moratorium as authorized by Congress.

b. In February 2001, an international arbitration panel established pursuant to NAFTA ruled that the blanket refusal of the United States to consider applications from Mexico-domiciled trucks to travel beyond the border zones due to safety concerns violated NAFTA. *See* J.A. 254, 279-80. The arbitration panel did not determine whether a delay in considering such applications as a result of compliance with domestic environmental laws would violate NAFTA and expressly noted that the panel "is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives." *Id.* at 280. Petitioners do not assert that the panel considered environmental issues at all, and, indeed, the panel did not—nor could it—bar the United States from enforcing NEPA and the CAA.

Respondents agree with petitioners that "[a]lmost immediately after the arbitrators' decision, the President made clear his intention to lift the moratorium on cross-border operations." Pet. Cert. 5; *see also* J.A. 57.

3. Meanwhile, FMCSA, a federal "administration" or agency within the Department of Transportation ("DOT") (49 U.S.C. § 113(a)), began the process of preparing rules

governing both applications for admission from Mexico-domiciled trucks for entry to the United States and the safety of those trucks. Nothing in the statutes governing FMCSA precludes the agency from taking into account environmental issues in promulgating such rules.

In May 2001, FMCSA proposed two rules that are pertinent here: (1) the "Application Rule" concerning the application form for Mexico-domiciled trucks seeking to operate beyond the border zones (known as the "OP-1 (MX)" application form) (*see* 66 Fed. Reg. 22371 (May 3, 2001)); and (2) the "Safety Monitoring Rule" involving safety monitoring of Mexico-domiciled trucks (*see* 66 Fed. Reg. 22415 (May 3, 2001)). Without providing any rationale or conducting an Environmental Assessment ("EA"), FMCSA determined that neither rule required preparation of an EIS under NEPA. 66 Fed. Reg. at 22377; 66 Fed. Reg. at 22418. FMCSA also failed to prepare a CAA conformity analysis for either rule.

4. Congress intervened before the rules became final and prior to consideration of any applications from Mexico-domiciled carriers to operate beyond the border zones. On December 18, 2001, Congress passed and the President signed into law the fiscal year 2002 Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 107-87, 115 Stat. 833. Section 350 of that Act provides in part: "No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border until the Federal Motor Carrier Safety Administration" puts into place certain regulatory standards for Mexico-domiciled trucks seeking to operate beyond the border zones. Pub. L. No. 107-87, § 350(a), 115 Stat. 864. The congressional prerequisites went

beyond requirements in then-existing or proposed regulations. *See* Pet. App. 53a-54a, 128a; *see also* Pet. Br. 9.

The restriction in Section 350 of the 2002 DOT Appropriations Act—which was enacted *after* Congress gave the President the authority to lift the moratorium and *after* the President announced his intention to lift the moratorium—was independent of any presidential action, and was to remain in place regardless of whether the President lifted the moratorium.

Accordingly, as of mid-December 2001, two *independent* barriers prevented Mexico-domiciled trucks from operating throughout the United States: (i) the restrictions Congress imposed in Section 350, which prohibited use of funds to process applications from Mexico-domiciled trucks until FMCSA complied with the preconditions; and (ii) the moratorium on cross-border trucking the President was authorized by Congress to maintain (which the President had already announced he would lift).

5. In March 2002, FMCSA issued new Application and Safety Monitoring Rules. Pet. App. 53a-202a. The rules were intended to meet five of the congressional preconditions outlined in Section 350. *See id.* at 53a-54a, 62a, 125a, 128a; Pet. Br. 13.

a. As part of the rulemaking, FMCSA received numerous comments, including comments on the environmental effects of the rules from, *inter alia*, various environmental organizations, experts on environmental and health issues, and the California Attorney General. *See, e.g.*, J.A. 232-48, 283-95, 307-71, 372-86, 387-413. The majority of those comments focused on air quality concerns. California's Attorney General, for example, expressed concern that under the CAA the federal government was "requiring California to meet stringent air quality standards, . . . while simultaneously approving the entry into California of a very significant new

source of pollutants that will make it more difficult to attain these standards." J.A. 375-76.

b. In promulgating the two revised rules, FMCSA did not prepare an EIS, but this time it did provide an EA, upon which the agency relied for a finding that the rules would have no significant impact on the environment. *See* Pet. App. 64a-65a, 106a-107a, 154a-155a, 182a. FMCSA failed to undertake an analysis for conformity with state air quality plans under the CAA. *Id.* at 65a-66a, 155a.

The Council on Environmental Quality ("CEQ") has promulgated regulations implementing NEPA that are "binding on all Federal agencies." 40 C.F.R. § 1500.3. The CEQ regulations permit an agency to prepare an EA to determine whether or not a more detailed EIS is necessary. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.11, 1508.13. FMCSA's EA was issued in January 2002 with respect to four proposed rules, including the Application and Safety Monitoring Rules, in an attempt to comply with NEPA. *See* J.A. 36, 47, 59; C.A. ER 29. On the basis of the EA, FMCSA made a "finding of no significant impact" and decided not to prepare the more detailed EIS. J.A. 34-35. Such a finding is permitted only when an action "will not" significantly affect the environment. 40 C.F.R. § 1508.13.

c. The EA makes three important concessions about the ramifications of the congressional preconditions in Section 350 (all of which necessarily follow from Congress' action). First, FMCSA must meet "several conditions" before the agency may expend funds to process applications for Mexico-domiciled trucks to travel beyond the border zones—the OP-1 (MX) applications. J.A. 57. Second, the proposed rules satisfy conditions of Section 350. *Id.* at 57-58; Pet. App. 53a-54a, 125a. Third, "*While the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect*, since FMCSA would still be

prohibited from processing OP-1 (MX) applications." J.A. 58 (emphasis added).

In addition to agreeing that, under Section 350, there will be no cross-border trucking without the rules and hence no environmental effects, the EA also makes other critical concessions about the agency's discretion to mitigate environmental effects. First, the new Application Rule is expected to result in a smaller increase in applications from Mexico-domiciled trucks than the old rule "because the revised application form would deter applicants that would be unable to adequately demonstrate their willingness and ability to comply with the safety regulations." J.A. 66-67. That is, making the application process more onerous will reduce the number of Mexico-domiciled trucks operating in the United States.

Second, there is a direct relationship between safety and the environment. Specifically, the EA states: "Aside from direct and indirect safety benefits, *the inspections could have an environmental benefit*, as they have the potential to alert officials of other problems, such as leaking" trucks. *Id.* at 201 (emphasis added). Also, "factors that affect emissions from vehicles include . . . maintenance practices." *Id.* at 98. Hence, to the extent the rules require better maintenance they will have beneficial environmental effects.

More generally, the EA provides: "FMCSA expects to target the highest risk [trucks] and bring them into compliance with United States *safety and environmental laws*, standards, policies, rules, and regulations." *Id.* at 193 (emphasis added); *see also id.* at 138 (describing benefits of safety audit for reducing "high-risk" trucks). That is, high-risk trucks present a risk to both safety and the environment, and FMCSA's rules would target both risks. By promulgating safety standards aimed at preventing high-risk trucks from obtaining operating authority, FMCSA would also prevent environmental problems from those same trucks.

d. The EA did not properly make a finding of no significant impact on the environment, as several examples demonstrate. First, the EA is inherently contradictory. The EA acknowledges that Section 350 means that there will be no Mexico-domiciled trucks in the interior of the United States absent agency action. *See id.* at 58. But then, claiming to examine the environmental effects when *both* the President lifts the moratorium and the agency promulgates new rules (*id.* at 56), and conceding "there could be an increase" in cross-border trucking beyond the current rates of increase (*id.* at 60; *see also id.* at 32-33, 316; C.A. ER 246), the EA "assumed that the implementation of the Proposed Action would not affect the trade volume between the United States, Mexico, and Canada" (J.A. 59). The EA cannot properly examine the effects of cross-border trucking without determining how increased trade volume will affect the number of trucks.

Second, the EA does not properly account for the emissions from even the artificially small number of Mexico-domiciled trucks it assumed will travel into the interior of the United States. There is overwhelming evidence that emissions levels for the Mexican trucking fleet have been, are now, and will in the future be higher than for the United States trucking fleet. *Id.* at 315, 332-38, 388, 392, 394-97, 411-12, 424, 456. For example, until 1993 there were no emissions standards for Mexico-domiciled trucks, which lagged significantly behind U.S. domiciled trucks in emissions controls. *Id.* at 334, 392, 456; *see also id.* at 426, 458-59. But the EA erroneously assumed that all Mexico-domiciled trucks fit the emissions profiles of U.S. trucks. *See id.* at 154, 205, 392, 410, 422, 456.

Third, despite a CEQ regulation requiring consideration of *local* effects (40 C.F.R. § 1508.27(a)), the EA determined the environmental effect of emissions contributions from Mexico-domiciled trucks by comparing them to "national levels." J.A. 147; *see also id.* at 150, 154, 157-58, 167, 327,

329. The EA did not examine separately areas along major transportation corridors just outside the border zones where cross-border trucking is likely to have the most environmental effects, such as Los Angeles, Houston, and Phoenix—areas that already are suffering from serious air pollution problems. *See id.* at 319-25, 330, 423.

Fourth, the same CEQ regulation requires consideration of *long-term* effects (40 C.F.R. § 1508.27(a)), but the EA limited its analysis to one year. *See* J.A. 331, 423-24. There is no analysis of what will happen over the long term, including after 2004 and 2007 when, as the EA notes, the United States emissions regulations become considerably more stringent—without any evidence that Mexico will follow suit. *See id.* at 118, 315, 392, 403, 432, 444, 457-58.

Fifth, FMCSA failed to consider "[t]he degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2). Despite the substantial record evidence discussed below, the EA overlooked the public health effects that will result from cross-border trucking.

Finally, although the agency has the ability to ameliorate environmental effects, the EA barely considered alternatives that could reduce environmental harm. And most of the exceedingly modest alternatives the agency considered relate solely to mitigating harm from inspections. *See* J.A. 193-96.

These and other limitations of the EA are critical. A respected consulting firm specializing in air quality issues (*id.* at 414) concluded that the document "is both inadequate in terms of scope as well as fatally flawed in terms of the methodology used to assess the significance of the air quality impacts" (*id.* at 310). Another respected air quality consultant (*id.* at 448) concluded that the EA "is seriously flawed because it underestimated the emissions impact" (*id.* at 410).

e. The public health effects from the emissions at issue are serious. The EA admits that "[a]ir pollutants are a

significant cause for concern for both public health and welfare." *Id.* at 93; *see also id.* at 103. This is particularly true for children. *Id.* at 293. Motor vehicles, including trucks with diesel engines, are significant contributors to air pollution. *Id.* at 95-95, 326, 421. Diesel trucks are particularly significant contributors of nitrogen dioxide ("NOx") and particulate matter ("PM"). *Id.* at 95, 97, 99, 312, 314, 326, 421. For instance, in the highway corridors from San Antonio, Texas to Monterrey, Mexico, and from Tucson, Arizona to Hermosillo, Mexico, approximately 80% of smog causing NOx and 90% of other pollutants are caused by freight trucking. *Id.* at 100-01. Most of the areas of the country that are in non-attainment (that is, do not meet national standards, *see id.* at 94) for PM are in the western United States, with the largest number of counties in Arizona and California. *Id.* at 209-10. These are the areas which, as discussed above, are likely to be most affected by cross-border trucking. *See id.* at 319-25.

Numerous studies indicate that diesel exhaust is associated with a significant increased risk of lung cancer. *Id.* at 441. California lists diesel exhaust as a known carcinogen. *Id.* at 235, 383; *see also id.* at 411. NOx creates ozone (or smog), which can aggravate asthma, emphysema, and other conditions. *See id.* at 99, 421. PM can cause cancer, increase the risk of cardiovascular mortality, impair lung function, and cause or aggravate respiratory illnesses. *Id.* at 317, 421, 440-43, 451-52. The EA lists cancer as a potential effect of the PM in diesel. *See id.* at 211.

Even moderate increased emissions of fine PM are associated with increased mortality. *Id.* at 436. "[I]ncreased emissions of fine particulate matter from Mexico-domiciled trucks can be expected to translate into incremental increases in premature deaths, an enhanced incidence of respiratory diseases, numerous lost work days and increased health care costs." *Id.* at 436-37; *see also id.* at 440, 446. Put another

way, "removing particulate matter from the atmosphere will translate directly into saved lives." *Id.* at 445. Exposure to fine particulate air pollution "is the single largest environmental public health problem at present in the United States." *Id.* at 436.

6. Respondents filed petitions for review of the rules in the court of appeals starting in May 2002. *See id.* at 1; Pet. App. 13a. The petitions sought to ensure that FMCSA complied with NEPA and the CAA in promulgating its rules, but did not seek to interfere with the President's decision whether to lift the moratorium. *See* J.A. 26a, 51a.

7. In November 2002, the President lifted the moratorium to permit cross-border trucking. *See* Pet. App. 13a-14a, 232a-34a. Despite this presidential action, Mexico-domiciled trucks were not able to travel into the interior of the United States (and thereby cause environmental effects beyond the border zones) because FMCSA still had to meet the *separate* prerequisites that Congress under Section 350 placed on the entry of the trucks.

8. On January 16, 2003, the court of appeals issued a decision requiring compliance with "long-established environmental laws." *Id.* at 51a. The court first found that respondent Public Citizen has standing to pursue this challenge. *Id.* at 14a-26a. The critical determination in the standing analysis was that FMCSA's actions would cause environmental harm because cross-border trucking would be permitted only after FMCSA had met the congressional conditions. *See id.* at 18a-22a. The lower court noted that the relief requested was not directed at presidential action and would not affect the viability of NAFTA. *Id.* at 26a. The court of appeals instead found that "the issues before us do not touch on [the President's] clear, unreviewable discretionary authority to modify the moratorium" and that "neither the validity of nor the United States' compliance with

NAFTA is before us." *Id.* Petitioners do not contest the standing decision. Pet. Cert. 14 n.6.

The court of appeals next addressed NEPA's statutory and regulatory requirements. Based on an analysis of the statute and CEQ regulations, the lower court found that the two challenged rules constitute "major federal actions" under NEPA, and that the rules may have a significant environmental impact; accordingly, FMCSA should have prepared an EIS. *See* Pet. App. 28a-43a. In particular, the lower court rejected FMCSA's contention that "the effects of the Application and Safety Rules are limited to the increased diesel emissions of Mexican trucks during the road-side inspections and safety monitoring mandated by the regulations." *Id.* at 30a. The court also found numerous other shortcomings in the EA. *Id.* at 31a-43a.

The court of appeals then turned to the CAA claims, holding that a conformity analysis was required. *Id.* at 46a-52a. The lower court found that FMCSA's actions were not subject to either of the CAA exemptions the agency advanced. First, FMCSA did not show that the total emissions caused by the rules would fall below the established threshold levels. *See id.* at 47a-48a. Second, the court held that regulations are not categorically excluded from the conformity analysis requirement. *See id.* at 48a-51a. Petitioners no longer press the second point. Pet. Br. 14 n.6; Pet. Cert. 10 n.4.

The court of appeals took pains to explain that the issue in this case "is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by [the agency] before promulgating" the rules at issue. Pet. App. 26a. The court "emphasize[d] that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us." *Id.* at 51a.

After the court below issued its January 16, 2003 decision, petitioners filed a petition for rehearing and petition for rehearing *en banc*, which the court of appeals denied without a request for an *en banc* vote by Order of April 10, 2003. *Id.* at 221a-22a.

9. FMCSA is in the midst of conducting both an EIS and a CAA conformity analysis, which may be completed as early as this summer. *See* Pet. Cert. 15 n.7; Resp. Br. Opp. Cert. 10.

10. Meanwhile, Congress twice reenacted the preconditions on Mexico-domiciled trucks operating throughout the United States, with the understanding that FMCSA must complete an EIS and a conformity analysis to meet those preconditions. On February 20, 2003, after the widely publicized decision by the court of appeals, Congress passed and the President signed into law the 2003 Consolidated Appropriations Resolution, which *reenacted* the preconditions for the 2003 fiscal year. Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 11, 419. On January 23, 2004, Congress passed and the President signed into law the 2004 Consolidated Appropriations Act, which again *reenacted* the preconditions, this time for the 2004 fiscal year. Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 3, 298. At the time of such reenactment, Congress knew that only the court of appeals' decision requiring an EIS and conformity analysis was standing in the way of cross-border trucking; indeed, the Senate and House Reports explicitly reference the decision. *See* S. Rep. No. 108-146, 108th Cong., 1st Sess. 69-70 (Sep. 8, 2003); H.R. Rep. No. 108-243, 108th Cong., 1st Sess. 81 (July 30, 2003).

SUMMARY OF ARGUMENT

Exercising its uncontested power under the Commerce Clause, Congress placed a restriction in Section 350 on FMCSA's use of appropriated funds to process applications

from Mexico-domiciled trucks to travel into the interior of the United States until the agency properly puts in place certain regulatory standards. To meet the congressional conditions, FMCSA promulgated the rules at issue in this case. Petitioners concede that FMCSA's action was a precondition to the operation of Mexico-domiciled trucks throughout the United States. Respondents challenge this agency action, not a separate presidential action. Regardless of the President's action with respect to the moratorium, there can be no cross-border trucking under Section 350 until FMCSA separately meets the congressional prerequisites.

Congress has comprehensive power under the Commerce Clause to enact safety and environmental requirements. In Section 350, Congress provided FMCSA authority over the entry of Mexico-domiciled trucks for cross-border trucking *separate* from the authority Congress previously gave the President with regard to the moratorium.

As this case challenges agency action rather than presidential action, judicial review is appropriate under the APA. Under this Court's precedents, "final agency action" challengeable under the APA exists where an agency makes a final decision that the President does not directly review. Because Congress provided FMCSA and the President separate authority over cross-border trucking, and because this case challenges only FMCSA's decision, judicial review of that agency's final action is proper.

Because Congress had the power to require environmental reviews as well as safety standards, the issue is whether Congress in enacting Section 350 meant to do so. That question can be determined without interpreting NEPA or the CAA because Congress has twice ratified the court of appeals' decision. After the lower court interpreted Section 350 and required an EIS and conformity analysis, Congress on two occasions took affirmative action to reenact the critical appropriations restriction when it was set to expire. The legislative history demonstrates that Congress did so with

full knowledge of the court of appeals' decision, and that the decision requiring environmental reviews was all that was standing in the way of cross-border trucking. Congress' intent to require the environmental reviews is plain, and Congress' power to do so cannot seriously be challenged by petitioners.

Should the Court reach the NEPA issues in this case, they too are governed by Congress' enactment of Section 350. The appropriations restriction made FMCSA's actions both a condition precedent to, and a proximate cause of, cross-border trucking and the consequent serious effects on the environment and public health. In such situations, even agencies that have no environmental responsibilities apart from NEPA must prepare an EIS. It is irrelevant under this Court's cases and the CEQ regulations that another actor not covered by NEPA, here the President, also had to take a separate action for environmental effects to result. It is also well within the purposes of NEPA to require the agency to prepare an EIS when, as here, the agency can shape its action to mitigate adverse environmental effects. FMCSA has substantial discretion over how stringent to make the safety standards, and therefore how many older Mexico-domiciled trucks—which are both less safe and more polluting—are permitted across the border.

The Clean Air Act requires states to attain and maintain federal air quality standards and imposes sanctions on those states that fail to do so. Congress enacted a conformity provision in the CAA to ensure that the federal government will not make it more difficult for a state to comply with federally mandated standards. FMCSA did not undertake a conformity analysis here even though the agency would cause environmental effects by allowing Mexico-domiciled trucks to travel into the interior of the United States. Under Section 350, the agency has control over permitting cross-border trucking to begin, how stringent to make the safety standards,

how to enforce the standards, and how to change the standards over time. FMCSA will thereby determine whether older, more heavily polluting trucks will be traveling into areas within the interior of the United States that are not in attainment with federal air quality standards, thus necessitating a conformity analysis.

ARGUMENT

I. THE COURT OF APPEALS' DECISION PROPERLY RESPECTED CONGRESSIONAL AUTHORITY

A. Congress Has Broad Power Under The Commerce Clause To Enact Prerequisites To The Entry Of Mexico-Domiciled Trucks

1. This case concerns the authority of Congress to require a federal agency to take specified action prior to the agency's use of appropriated funds to allow Mexico-domiciled trucks to operate throughout the United States. Petitioners do not take issue with Congress' power to do so. *See* Pet. Br. 21-22. The Constitution provides that Congress has the power to "regulate commerce with foreign nations, and among the several states." Art. I, § 8, Cl. 3. It is hard to imagine an activity more squarely within Congress' Commerce Clause power than the regulation of trucks traveling from another country into this country and then throughout the several states. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat. 1) 1, 193-94 (1824) (Commerce Clause "comprehend[s] every species of commercial intercourse between the United States and foreign nations" such that "[n]o sort of trade can be carried on between this country and any other, to which this power does not extend"); *United States v. Lopez*, 514 U.S. 549, 572 (1995) (Kennedy, J., concurring) ("Even the most confined interpretation of 'commerce' would embrace transportation between the States.").

The trucking activity at issue plainly involves both foreign commerce and interstate commerce, providing Congress broad power to regulate, including with respect to issues of safety and the environment. *See Pierce County, Washington v. Guillen*, 537 U.S. 129, 147 (2003) ("legislation aimed at improving safety in the channels of commerce" is "within Congress' Commerce Clause power"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981) ("[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.").

2. Congress exercised its commerce power by placing a restriction on *agency* action in an appropriations bill. Petitioners do not contest that Congress has the power to put in place safety and environmental requirements or that Congress may do so through the appropriations process. Nonetheless, they seek to nullify the exercise of congressional power by claiming that the challenged action is the President's, and that respondents seek to apply NEPA and the CAA to the President's action of lifting the moratorium. *See* Pet. Br. 24-25 ("The President's decision to lift the moratorium on cross-border operations by Mexican carriers is not subject to NEPA's requirement of preparing an EIS."); *id.* at 43 ("[T]he Presidential action to open the border is exempt from the conformity-review requirement."); *see also id.* at 1, 2, 18, 23, 26. Repetition does not strengthen a hollow argument. Petitioners' contention that respondents challenge the President's action, not FMCSA's separate action, is the linchpin of petitioners' arguments. Once it is clear that it is the agency's action that is at issue, petitioners' entire argument collapses.

Petitioners' argument cannot be reconciled with the statutory framework under which FMCSA operates. Regardless

of what action the President takes, Congress prohibited FMCSA from processing applications for cross-border trucking until the agency meets the requirements of Section 350.

For this reason, as petitioners acknowledge, FMCSA promulgated the rules challenged in this case to meet conditions Congress imposed in Section 350. *See* Pet. App. 53a-54a, 125a; Pet. Br. 13. No matter what happens with regard to the moratorium, Mexico-domiciled trucks cannot travel throughout the United States with the attendant environmental effects unless the challenged rules are implemented. The agency action in promulgating the rules is the subject of this case.

3. Petitioners have repeatedly conceded that FMCSA has control over the initiation of cross-border trucking. FMCSA admitted in the EA, "[w]hile the appropriations hold is in effect, any Presidential order to modify the statutory moratorium will have no practical effect." J.A. 58; *see also* Pet. Br. 11. Petitioners similarly concede in their brief that Congress in Section 350 made FMCSA's action "a precondition" to processing applications. Pet. Br. 32; *see also id.* at 35. The court of appeals was therefore correct in recognizing that the President and the agency "both had to take action for the event to occur." Pet. App. 19a.

Petitioners attempt to sidestep their concessions by arguing that "Section 350 of the 2002 Appropriations Act does not render FMCSA responsible for the President's decision to allow cross-border operations by new Mexican carriers." Pet. Br. 32. But this is not and has never been the point. Nor are petitioners correct in arguing that by lifting the moratorium the President caused the rules. *See id.* at 31. Congress gave the President and FMCSA separate spheres of responsibility. As petitioners acknowledge, the "function of processing applications is *separate* from the President's decision to lift the moratorium." Pet. Cert. 19-20 (emphasis added). The court of appeals therefore properly recognized that the actions

of the President and the agency are independent. Pet. App. 19a, 21a. Nor was FMCSA merely acting as a "subordinate" of the President (Pet. Br. 32) or simply "implementing a policy of the President" in promulgating the rules (Pet. Cert. 16). *Congress* made the *agency's* actions a precondition to the entry of Mexico-domiciled trucks as part of *Congress'* policymaking prerogatives. FMCSA is only subordinate to the President and implementing presidential policy in the sense that *every* executive branch agency in every situation is subordinate to the President or in some sense implementing presidential policy. This does not affect Congress' authority to require FMCSA to comply with NEPA and the CAA in taking action to permit cross-border trucking.

B. Congress' Grant Of Authority To FMCSA Does Not Interfere With The Separate Authority Congress Delegated To The President

1. Congress properly exercised its power in giving FMCSA separate decisionmaking responsibility over Mexico-domiciled trucks notwithstanding the issues of trade and presidential authority petitioners raise. Petitioners correctly recognize that NAFTA was a "joint exercise" of the President's and Congress' powers. Pet. Br. 22.[3] Congress imposed the moratorium and delegated to the President authority to lift the moratorium. *See, e.g.*, 49 U.S.C. § 13902(c); J.A. 49. Petitioners concede that when "the President lifted [the] trade moratorium," he did so "pursuant to express congressional authorization" (Pet. Br. 2), and they do not claim that absent such a delegation by Congress the President would have authority to permit cross-border trucking (*id.* at 22).

[3] Petitioners do not argue that NAFTA diminished Congress' broad authority over commerce, both foreign and domestic, including over safety and environmental issues. Nor could they. *See, e.g.*, 19 U.S.C. § 3312(a)(1) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.").

Indeed, in lifting the moratorium on November 27, 2002, the President noted that the Interstate Commerce Commission Termination Act of 1995 "empowered the President to make further modifications to the moratorium." 67 Fed. Reg. 71795 (Dec. 2, 2002), *reprinted in* Pet. App. 232a; *see also* 66 Fed. Reg. 30799 (June 5, 2001).

Petitioners argue that Congress granted the President sole authority over cross-border trucking because "Congress has given the President express authority to determine whether, and to what extent, Mexican motor carriers should be granted access to United States markets." Pet. Br. 22. This argument is simply incorrect. Congress enacted Section 350 *after* granting the President authority to lift the moratorium. That appropriations restriction gave FMCSA separate authority over the access of Mexico-domiciled trucks to the United States by making the conditions set forth in Section 350 "a condition precedent" (Pet. Cert. 19) for the entry of such trucks. This case involves FMCSA's separate responsibility as provided by Congress and is a challenge to that agency's action; the President's prerogatives are not at issue.

2. Petitioners do not dispute that Congress has the power to condition cross-border trucking upon FMCSA's issuance of safety standards, notwithstanding the President's separate authority to lift the moratorium or to negotiate bilateral agreements on cross-border commerce.[4] But if Congress had the constitutional power to make the entry of Mexico-domiciled trucks contingent on FMCSA's issuance of valid *safety* standards, Congress also had the power to make entry contingent upon compliance with *environmental* laws. Both the power to require safety standards and the power to require

[4] To the extent petitioners claim Congress has *unconstitutionally* impinged on the President's foreign-affairs powers by enacting Section 350, that argument has been waived because it was not raised or passed on below.

environmental reviews equally affect the ability of trucks to come into the United States, and therefore have the same ramifications for presidential action. Petitioners' foreign affairs argument would strip Congress of any power to regulate the conditions of commerce from Mexico or other countries with which the United States has trade agreements, including enacting restrictions on transportation of hazardous materials or unsafe foods or pharmaceutical products.[5]

Nor can petitioners argue that there is something unique about environmental reviews because they take time to complete. *See* Pet. Br. 40. There is no meaningful distinction between the delay caused by the imposition of safety requirements and that caused by environmental reviews. In any event, the decision whether determining and possibly mitigating the environmental effects creates too much delay belongs to Congress. *See, e.g., The Abby Dodge v. United States*, 223 U.S. 166, 176-77 (1912) ("[S]o complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."). Congress certainly understood the possibility of delay when it enacted Section 350 in *December 2001*. The appropriations provision imposed numerous preconditions to the entry of trucks even though the President had announced his decision to lift the moratorium by *January 2002*, just one month later. *See* J.A. 254.

[5] Petitioners invoke language about foreign affairs from cases involving the President's powers during times of war (*Ludecke v. Watkins*, 335 U.S. 160 (1948)), and over national security (*Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)); *see also United States v. Curtis-Wright Export Corp.* 299 U.S. 304 (1936) (arms sales to foreign countries engaged in armed conflict). *See* Pet. Br. 21. But these are areas where the President's authority is at its peak, and this case plainly does not implicate the President's power as Commander-in-Chief. It is a long leap from those cases to this one, which involves Congress' regulation of traditional commerce—an area where petitioners concede Congress has comprehensive power. *See id.*

C. Judicial Review Of Final Agency Action Is Appropriate

1. The APA permits review of "final agency action." 5 U.S.C. § 704; *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Petitioners do not dispute that FMCSA's rules constitute "final agency action." Instead, petitioners argue that the President is not an agency and his decisions are not reviewable by the courts. *See* Pet. Br. 25-26, 43-44. But this is irrelevant because, as discussed above, this case does not challenge the President's decision to lift the moratorium, but rather FMCSA's action pursuant to its *separate* responsibility under Section 350.

2. Petitioners rely primarily on this Court's ruling in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Court there established that when an agency decision is not "a final and binding determination," there is no "final agency action" under the APA. *Id.* at 798. *Franklin* does not preclude judicial review of otherwise "final agency action" just because the President has a *separate* decision to make. *Franklin* simply found that there is no final action under the APA when an agency only makes a "tentative recommendation" to the President. *Id.*; *see also Dalton v. Specter*, 511 U.S. 462, 469 (1994) (describing *Franklin* as follows: "Because the President reviewed (and could revise) the Secretary's report, made the apportionment calculations, and submitted the final apportionment report to Congress, we held that the Secretary's report was 'not final and therefore not subject to review.'") (quoting *Franklin*, 505 U.S. at 798). That is, *Franklin* (and *Dalton*) involved direct presidential review of an agency recommendation.

Unlike *Franklin* (and *Dalton*), this is not a case where the agency provides a recommendation to the President, who then has final decisionmaking authority with respect to that

recommendation.[6] Under Section 350, FMCSA's action has independent, legally operative effect with respect to whether Mexico-domiciled trucks are permitted into this country, and the President plays no role in reviewing or revising FMCSA's rules. In *Bennett*, this Court's most recent case on the subject, the Court clarified the limited nature of *Franklin*, noting that "our holding that this [action] did not constitute 'final agency action' was premised on the observation that the report carried 'no direct consequences' and served 'more like a tentative recommendation than a final and binding determination.'" 520 U.S. at 178 (quoting *Franklin*, 505 U.S. at 798). In sum, challenges to administrative proceedings that are final without presidential action are permitted.

3. In keeping with these principles, the court of appeals reviewed only agency action (Pet. App. 51a), not the President's action, finding that "the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium" (*id.* at 26a). A challenge to an agency's failure to comply with a statute is eminently proper. *See, e.g., Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (stating presumption that Congress "expects the courts to grant relief" if federal agency violates statutory command); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (rejecting contention that case was not suitable for judicial review because it involved foreign relations by stating that "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones").

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[6] This case is also unlike *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948), where the order at issue was not a final disposition, but simply a recommendation to the President with no independent force.

II. CONGRESS RATIFIED THE COURT OF APPEALS' DECISION

Because Congress has the power to place environmental conditions on trucks crossing the border, the only remaining question is whether Congress did require environmental analyses in this instance. Before we demonstrate that the court of appeals was correct in its application of NEPA and the CAA to FMCSA's actions, we show that Congress ratified the lower court's decision that an EIS and conformity analysis were required—not once, but twice—thereby removing any doubt that Congress intended NEPA and the CAA to apply here. Since the court of appeals decided this case, Congress has made crystal clear that the enactment of Section 350 triggered the application of these environmental statutes. Accordingly, the doctrine of ratification provides a separate, narrow ground for this Court to affirm the decision of the court of appeals.

1. The doctrine of ratification is well-settled: "Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982).

This case presents at least as strong a claim for application of the ratification doctrine as any case previously before this Court. The court of appeals required an EIS and conformity analysis on the basis that the challenged rules "were issued in compliance with a rider to the 2002 Appropriations Act for DOT [Section 350], which conditioned funding for permitting Mexican truck traffic into the United States on DOT's issuance" of the rules, that the rules were an independent cause of trucks being permitted to cross the border, and that the rules therefore caused environmental effects. Pet. App. 9a, 19a-23a, 30a-31a, 47a. The court of

appeals expressly noted that the rules that would permit cross-border trucking "would be in effect now absent this action." *Id.* at 34a.

After the court of appeals ruled on January 16, 2003, Congress *twice* reenacted Section 350—once on February 20, 2003, and again on January 23, 2004. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 11, 419 ("Funds appropriated or limited in this Act shall be subject to the terms and conditions stipulated in section 350 of Public Law 107-87, including that the Secretary submit a report to the House and Senate Appropriations Committees annually on the safety and security of transportation into the United States by Mexico-domiciled motor carriers."); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 3, 298 (same).

The most basic element of ratification is readily satisfied because Congress knew about the court of appeals' decision when it reenacted Section 350. There is no need to presume congressional awareness because both the Senate and House Reports for the fiscal year 2004 reenactment *expressly reference the decision*. The Senate Report states:

> On November 27, 2002, the Secretary of Transportation announced that all the preconditions had been met and directed the Federal Motor Carrier Safety Administration [FMCSA] to begin to open the border. However, on January 16, 2003, *the Ninth Circuit Court of Appeals in Public Citizen v. Department of Transportation [DOT], delayed opening the border pending completion of environmental impact statements and a Clean Air Act conformity determination on the FMCSA's implementing regulations*.

S. Rep. No. 108-146 at 69-70 (emphasis added). Likewise, the House Report states:

> The Administration has completed all requirements under section 350 and has implemented a regime of

> regulations to ensure the safety of Mexican trucks operating within the U.S. However, on January 18, 2003, *the 9th U.S. Circuit Court of Appeals blocked Mexican trucks from gaining wider access to U.S. highways citing that DOT did not prepare a full environmental impact statement.*

H.R. Rep. No. 108-243 at 81 (emphasis added).[7]

In both fiscal years 2003 and 2004, when Section 350 was about to expire, Congress had the complete power to express its disapproval of the court of appeals' decision simply by allowing Section 350 to lapse, or by reenacting the provision while stating that nothing in the appropriations language required FMCSA to prepare an EIS or a conformity analysis. Congress knows how to exercise such power in the context of the appropriations process, and has exempted certain activities from NEPA's application, including in response to litigation.[8] That Congress chose not to do so here and instead

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[7] Moreover, at the time of the fiscal year 2003 reenactment on February 20, 2003, Congress certainly knew about the court of appeals' decision. The decision received widespread publicity in the Washington Post, New York Times, Wall Street Journal, Los Angeles Times, CBS Evening News, National Public Radio, and other media sources. In these circumstances, in addition to the *proof* that Congress knew about the decision during the time of the second reenactment, there is no basis to overcome the *presumption* that Congress knew about the decision at the time of the first reenactment.

[8] *See, e.g.*, 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, Tit. I, Chap. 7, §§ 706(a)(3), (j), 116 Stat. 820, 864, 868 ("[A]ctions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA."); Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, Tit. II, § 2001(d), 109 Stat. 194, 244 ("The issuance of any such regulation . . . shall not require the

reenacted the same restriction twice speaks volumes about Congress' intent.

2. Petitioners' responses that congressional reenactment had nothing to do with the court of appeals' decision and that the legislative history only involved safety and not environmental issues miss the mark. *See* Pet. Br. 33. The Committee Reports quoted above expressly refer to the decision in this case and state that the basis of the court of appeals' decision was environmental. S. Rep. No. 108-146 at 69-70 ("Public Citizen v. Department of Transportation [DOT], delayed opening the border pending completion of environmental impact statements and a Clean Air Act conformity determination."); H.R. Rep. No. 108-243 at 81 ("Court of Appeals blocked Mexican trucks from gaining wider access to U.S. highways citing that DOT did not prepare a full environmental impact statement"). Thus, there is no basis to suggest that congressional reenactment did not address the decision or have environmental implications.

Moreover, at the time of the 2004 reenactment, *only* the failure to prepare an EIS and conformity analysis was preventing cross-border trucking. *See* H.R. Rep. No. 108-243 at 81 ("The Administration has completed all requirements under section 350."); S. Rep. No. 108-146 at 69 ("On November 27, 2002, the Secretary of Transportation announced that all the preconditions had been met."). Yet Congress reenacted the entirety of Section 350 *twice*, thereby ratifying the decision and requiring the environmental reviews.

Petitioners attempt to evade the doctrine of ratification by characterizing the two reenactments as congressional *inaction*. Pet. Br. 33; *see also Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186-87 (1994). But appropriations bills by their very nature have expiration dates.

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preparation of an environmental impact statement under . . . the National Environmental Policy Act of 1969.").

Only by affirmatively taking action did Congress provide for the continued vitality of Section 350. Unlike in *Central Bank*, where Congress did not reenact the statutory provisions at issue during the relevant time period (511 U.S. at 185), here Congress twice affirmatively reenacted Section 350 because the legislation was set to expire.

In sum, the Court may decide this case on an even narrower ground than the narrow decision of the court of appeals. Congress has the power to require FMCSA to conduct an EIS and a conformity analysis, and Congress twice reenacted the appropriations language upon which the court of appeals relied after the court required these reviews. Thus, this Court may find that the reviews are required without an independent analysis of NEPA and the CAA and how those statutes interact with the appropriations restriction. Because of the unique facts of this case, Congress' intent to require environmental reviews can be determined without deciding any issue of law other than that Congress meant the EIS and conformity analysis to proceed in this instance.

III. NEPA REQUIRES FMCSA TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

Even apart from congressional reenactment of Section 350, the conclusion that NEPA required FMCSA to prepare an EIS flows directly from Congress' original decision making action by FMCSA a prerequisite to cross-border trucking. Petitioners' principal argument to the contrary—that "[t]he *President's decision* to lift the moratorium on cross-border operations by Mexican carriers is not subject to NEPA's requirement of preparing an EIS" (Pet. Br. 24-25 (emphasis added))—is, as we have shown, non-responsive. Moreover, petitioners do not contest the lower court's findings as to the deficiencies of the EA, including that the EA does not properly analyze local effects (Pet. App. 33a), long-term effects (*id.* at 34a), effects on public health and safety (*id.* at 35a), uncertain environmental effects such as increased truck

traffic and the emissions profile and age of Mexico-domiciled trucks (*id.* at 35a-39a), and effects on California air pollution laws (*id.* at 39a-40a). Petitioners instead provide an ill-conceived causation analysis in an attempt to excuse the failings of the EA. Relying again on the President's separate action with regard to lifting the moratorium, petitioners dispute the causal link between FMCSA's actions and the environmental effects of cross-border trucking. We demonstrate below that petitioners' analysis is incorrect.[9]

A. FMCSA's Actions Will Cause Environmental Effects

1. NEPA applies to "all agencies of the Federal Government" (42 U.S.C. § 4332(2)), including FMCSA, and petitioners concede that FMCSA must comply with NEPA. *See* Pet. Br. 38 n.16. Under NEPA, proposed "major Federal actions significantly affecting the quality of the human environment" require an EIS. 42 U.S.C. § 4332(2)(C).[10] To interpret this broad statutory command we, as do petitioners, rely on the CEQ regulations implementing NEPA, which are "binding on all Federal agencies" (40 C.F.R. § 1500.3)

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[9] The APA provides for reversal of agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because the issue here is whether FMCSA followed the law in interpreting NEPA's standards on causation and other issues, the strict standard of review governing legal issues applies. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989) (distinguishing legal disputes, such as one that would turn on legal meaning of "significant" under NEPA, from factual disputes which implicate substantial agency expertise). Even under the more deferential standard applicable to an agency's factual determination (*see id.* at 377), FMCSA has *not* taken the requisite "hard look" at the environmental consequences of its proposed action (*id.* at 374).

[10] The court of appeals separately examined "major federal action" and "significantly affecting the environment." *See* Pet. App. 29a-43a. The portions of the opinion that petitioners contest relate to the former component, on which we focus.

and are "entitled to substantial deference." *Marsh*, 490 U.S. at 372.

The CEQ regulations define "major federal action" to "include[] actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "[a]doption of official policy, such as rules, regulations, and interpretations." 40 C.F.R. § 1508.18. Further, "effects" include "[i]ndirect effects, which are *caused by* the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*." 40 C.F.R. § 1508.8(b) (emphases added).

2. As previously discussed, and as petitioners concede, even though the President lifted the moratorium, Section 350 precludes Mexico-domiciled trucks from operating in the interior of the United States absent FMCSA action. *See supra* at pp. 19-21; Pet. Cert. 11, 19 ("Section 350 did establish the promulgation of FMCSA's safety rules as a condition precedent to processing Mexican carriers' applications."). Since the President lifted the moratorium in November 2002, there has been no cross-border trucking.[11]

Congress gave FMCSA separate control over whether such nationwide trucking could occur. FMCSA's action is therefore a key condition precedent of any environmental effects. There is no requirement under NEPA that agency action also be the sole cause of environmental effects. For instance, this Court has found that a Forest Service "special use permit" that authorizes development of a ski resort by a private developer constitutes "major Federal action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,

[11] Having conceded that Mexico-domiciled trucks cannot travel throughout the United States until the challenged rules are implemented, petitioners spend considerable time rebutting a straw man: That FMCSA's rules caused the President to lift the moratorium. *See* Pet. Br. 30-32. Respondents have never made this argument.

336-37 (1989); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 399-400 (1976); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 318-19 (1975). In *Robertson*, as here, there was "major federal action" because the agency's decision was a condition precedent for environmental effects, even though other actors not covered by NEPA also had to take action for there to be any such effects.[12]

3. Petitioners' reliance on *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766 (1983), is misplaced. In that case, the Court examined whether an EIS was necessary to evaluate the possible psychological harm from

[12] The courts of appeals regularly find "major federal action" in such circumstances. *See, e.g., Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) ("if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action," even though environmental effects will not occur absent further action by state governments not subject to NEPA and by private actors' fishing); *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 292-93 (1st Cir. 1995) (Nuclear Regulatory Commission's permission for operator of nuclear power plant to decommission facility constitutes "major federal action"); *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1041, 1042 (4th Cir. 1986) ("Because of the inevitability of the need for at least one federal approval, we think that the construction of the highway will constitute a major federal action," even though a county government would have to authorize construction.); *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975) (Department of Interior approval of leases to private company that would conduct coal mining operations was "major federal action").

This concept is so well established that it is often accepted without discussion. *See, e.g., Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428, 433 n.6 (8th Cir. 1992) (noting parties do not dispute that there is "major federal action" where Corps of Engineers issued permit upon application of city for construction of bridge by private contractor); *Sierra Club v. Marsh*, 769 F.2d 868, 870, 882 (1st Cir. 1985) (Breyer, J.) (federal agencies responsible for grant of "necessary permits and funding" for state to build cargo port and causeway must prepare EIS); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (federal agency that leases land for oil and gas exploration by private parties must prepare EIS).

the risk of an accident that might conceivably result from the restarting of a nuclear reactor. *See id.* at 768. *Metropolitan Edison* thus did not address the connection between agency action and harm to the environment, but rather the connection between harm to the environment and psychological harm, which in that case was obviously attenuated. *See id.* at 775; Pet. Br. 34. The case did not concern the classic threshold NEPA issue of the connection between agency action—here the issuance of rules that allow cross-border trucking—and harm to the environment. That issue, which is the issue in this case, is governed by *Robertson* and like cases.

But even under the analysis *Metropolitan Edison* employed (*see* 460 U.S. at 775-77), an EIS is required here. Petitioners are simply wrong in arguing that this case, like *Metropolitan Edison*, "involved a long 'causal chain' between the agency's action" and the environmental harm. Pet. Br. 34 (quoting *Metropolitan Edison*, 460 U.S. at 774-75). To the contrary, the rules serve the gatekeeper function of determining which trucks will and will not be able to travel into the interior of the United States. The President lifted the moratorium, but under Section 350, FMCSA's rules are also necessary for Mexico-domiciled trucks to travel beyond the border zones and affect the environment. And, the standards contained in the rules will determine precisely which trucks will do so. There is much more than a "bare 'but for' relationship" (Pet. Br. 33) between FMCSA's rules and the predictable environmental effects of trucking beyond the border zones. Rather, there is an extremely close connection between the application of FMCSA's rules and the environmental harm they will cause. Because of Section 350, FMCSA's rulemaking is a *proximate cause* of those environmental effects in the classic sense that there is "a reasonably close causal relationship." *Metropolitan Edison*, 460 U.S. at 774.

4. Petitioners refer to the President's action in lifting the moratorium as an "intervening event." Pet. Br. 10-11, 31.

But there are two independent conditions that must be satisfied for cross-border trucking: the President must lift the moratorium and FMCSA must meet the prerequisites of Section 350. That Congress has enacted two conditions does not deprive the performance of each one of its causal significance. Otherwise, every time two federal agencies need to issue permits for a state construction permit, one of them would be an "intervening event." Indeed, NEPA does not even recognize the concept of an "intervening event" at all. There is no reason to impose such a requirement separate and apart from the concept of foreseeability already established by 40 C.F.R. §1508.8(b). *See supra* at p. 32.

Even assuming *arguendo* that an intervening cause can affect an agency's obligations under NEPA and that the President's action in lifting the moratorium is an intervening cause, petitioners' argument fails in light of traditional tort law principles and the CEQ regulations. Under tort law: "*Foreseeable intervening forces* are within the scope of the original risk, and hence of the defendant's negligence." W. Page Keeton *et al.*, Law Of Torts 303 (5th ed. 1984) (emphasis added). Put another way, if "the intervening cause is 'foreseeable,'" the defendant is still liable. *Id.* at 302. Here, the President's action in lifting the moratorium was not simply foreseeable, it was inevitable. As petitioners concede, the President announced his intention to lift the moratorium *before* the agency promulgated its rules. *See, e.g.*, Pet. Cert. 5.[13] Therefore, the environmental effects of the flow of trucks from Mexico to interior points of the United States were reasonably foreseeable at the time FMCSA promulgated

[13] Petitioners belatedly speculate that it was "possible" that something could have changed the President's mind. Pet. Br. 31. The test under the CEQ regulations, however, is "reasonably foreseeable" not conceivably possible. 40 C.F.R. § 1508.8(b). The EA actually dismissed consideration of a scenario in which the President declined to lift the moratorium. J.A. 57. It is too late to argue that scenario is reasonably foreseeable.

its rules and are now certain in light of the President's lifting the moratorium.

5. This causation analysis does not subject a presidential decision to NEPA for, as we have pointed out, the President's decision is not being reviewed, only the actions of FMCSA. *See supra* at pp. 19-20.[14] The relevant question is whether the *agency's* actions may significantly affect the environment. Petitioners' argument that the President is exempt from NEPA misses the point. *See* Pet. Br. 24-27. One or more of the actors that cause environmental effects (state agencies, construction companies, etc.) are often exempt from NEPA. Those actors do not have to prepare an EIS, and respondents do not seek to require the President to do so. But that does not excuse an agency that is covered by NEPA from preparing an EIS when it takes action that is a key condition precedent to, and a proximate cause of, significant environmental effects.

Petitioners' claim that respondents challenge the effects of the President's action (*see* Pet. Br. 2, 3, 27-30) is the same as characterizing *Robertson* as a challenge to the effects of a private company's decision to build a ski resort. But in that and similar cases the actions of the federal *agency* are subject to NEPA. That the statute limits who must prepare an EIS to federal agencies does not mean that a covered agency may ignore the environmental effects it causes because an entity not within the statute also must take action to cause the effects.

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[14] Petitioners claim respondents are challenging the President's lifting of the moratorium because we have cited a report that criticizes the EA's "No Action Alternative," under which the President lifts the moratorium, there are no new rules promulgated, and FMCSA nonetheless allows cross-border trucking *notwithstanding* Section 350's express prohibition of such activity. *See* Pet. Br. 29; J.A. 56, 58, 63. Petitioners certainly cannot defend the EA and rebut criticisms of it by relying on a scenario grounded on defiance of the law.

Petitioners claim that an agency's NEPA review cannot touch on "sensitive and highly discretionary areas such as foreign affairs." Pet. Br. 26. The CEQ regulations, however, explicitly include "treaties and international conventions or agreements" within the realm of "federal actions" subject to NEPA. 40 C.F.R. § 1508.18(b)(1). "[L]egislative proposals" (40 C.F.R. § 1508.18(a)), including "requests for ratification of treaties" (40 C.F.R. § 1508.17), also are "federal actions" subject to NEPA. Agencies covered by NEPA therefore prepare EISs even though their actions may take place against the backdrop of foreign affairs. *See, e.g.,* 64 Fed. Reg. 31553, 31553-54 (June 11, 1999) (Air Force to prepare EIS with regard to dismantlement of missile system that would be required by treaty between United States and Russia).

B. Preparation Of An EIS Would Further NEPA's Purposes

In cases in which there is any doubt as to causation—and this is not one of those cases—courts "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Metropolitan Edison*, 460 U.S. at 774 n.7. As we have previously discussed, the legislative intent could not be more clear: Through Section 350, Congress made FMCSA action a prerequisite to the cross-border trucking that will cause the environmental effects, and then confirmed this by twice reenacting the preconditions after the court of appeals required an EIS. *See supra* at pp. 26-30.

In addition, NEPA must be applied "to the fullest extent possible." 42 U.S.C. § 4332. With that command in mind, NEPA has two aims: "It ensures that *the agency*, in reaching its decision, will have available, and *will carefully consider*, detailed information concerning significant environmental impacts"; and it "guarantees that the relevant *information will be made available to the larger audience* that may also play a

role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349 (emphases added); *see also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983); 40 C.F.R. §§ 1500.2, 1502.1. FMCSA's preparation of an EIS would advance both of these aims.

1. An EIS would ensure that FMCSA considers the environmental effects of allowing Mexico-domiciled trucks to travel into the interior of the United States before it is too late for the agency to do anything to mitigate the effects. *See Robertson*, 490 U.S. at 349.

NEPA specifically makes its policies and goals "*supplementary* to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335 (emphasis added). The statute ensures that environmental issues are considered along with more traditional priorities. *See, e.g.*, 42 U.S.C. § 4332(2)(B). Petitioners claim FMCSA does not have "expertise" in issues beyond safety and need not "step back from the immediate safety-related task at hand and evaluate under NEPA the environmental effects." Pet. Br. 3, 35. This contention is at odds with NEPA. This Court has made clear that NEPA constrains agencies possessing statutory duties that do not explicitly address environmental issues, and which undertake tasks that are not environmental in nature. *See, e.g., Aberdeen*, 422 U.S. at 318-19 (regarding Interstate Commerce Commission's general revenue proceeding).[15] The only exception is if compliance with NEPA is impossible. *See* 40 C.F.R. § 1500.6. Petitioners do not argue

[15] Petitioners cite *Aberdeen* for the proposition that an EIS is not warranted here because it would not serve a purpose in informing FMCSA's decision. *See* Pet. Br. 38. But *Aberdeen supports* requiring FMCSA to prepare an EIS because the Court there held only that "no purpose" would be served by ordering an agency to explore environmental issues when the same agency was *already doing so in another proceeding*. 422 U.S. at 325.

FMCSA's statutory authorization makes compliance impossible. *See* Pet. Br. 38 n.16.

Petitioners characterize FMCSA's rules as "ministerial." Pet. Br. 39. But petitioners do not dispute that the agency has meaningful discretion over how to satisfy the preconditions in Section 350. *See* J.A. 481. Among other examples, FMCSA could add to the nine safety audit areas of Section 350(a)(1)(B), as the agency did by requiring that trucks have "other basic safety management controls in place." Pet. App. 116a. The agency further used its discretion to provide a detailed explanation of the criteria FMCSA would use for safety audits. *Id.* at 118a-24a. FMCSA also could determine whether to conduct safety audits in Mexico or the United States. *See id.* at 114a. The agency likewise enjoys discretion over the frequency of inspections. *See* J.A. 141-42.[16]

[16] Indeed, besides providing the agency broad discretion over how stringent to make the safety standards, Congress nowhere stated that FMCSA had to promulgate rules meeting the preconditions specified in Section 350, only that the agency must do so before spending appropriated funds to process applications for cross-border trucking. Pub. L. No. 107-87, § 350(a), 115 Stat. 864. Congress certainly knows how to require agencies to adopt rules, but did not do so here. Nor do other statutes governing FMCSA mandate that the agency meet the numerous preconditions in Section 350, as demonstrated by the dramatic differences between the original proposed Application and Safety Monitoring Rules and the more extensive rules promulgated after Section 350. *Compare* 66 Fed. Reg. at 22377 *and* 66 Fed. Reg. at 22419-20 *with* Pet. App. 107a-24a *and* 183a-202a. Petitioners' only claim to the contrary is a passing reference to the effect that, because FMCSA must grant authority to "particular carriers" that satisfy requirements (Pet. Br. 22-23; *see also* J.A. 52), the agency is "effectively require[d]" to promulgate rules that meet the conditions of Section 350. Pet. Br. 35. This point is inapposite because the issue is FMCSA's discretion whether or not to promulgate rules (which the agency enjoys), not to ignore them in particular instances once promulgated (the issue petitioners discuss).

Given this discretion over the content of the rules, FMCSA could decide, in light of an EIS, to consider enacting more restrictive safety standards that would also mitigate the environmental effects of Mexico-domiciled trucks operating throughout the United States.

The agency concedes that there is a correlation between safety and environmental concerns in that older, less safe trucks pollute more. In the court of appeals, FMCSA suggested that increased emissions from Mexico-domiciled trucks will not be as great because "the heightened standards put into place by the challenged safety rules will tend to restrict the number of older (pre-1993) Mexican trucks that can be operated in the United States." J.A. 484; *see also* Pet. Br. 12; J.A. 67, 98, 193, 201.

The relation between tighter safety rules and more environmental protection makes eminent sense as Mexico-domiciled trucks began meeting United States safety and environmental standards at approximately the same time (*see id.* at 255), and hence the same, older trucks are both more dangerous and more polluting. By making the safety rules more stringent, FMCSA could thus help mitigate the serious environmental and public health problems resulting from cross-border trucking.[17] In light of the agency's discretion,

[17] Petitioners do not dispute any of this; they only claim that the point is waived because it was raised in response to FMCSA's argument below (J.A. 484) that the more stringent the agency made the safety standards, the fewer older, more polluting, trucks would be allowed entry. *See* Pet. Br. 28-29. The agency also acknowledged this tie between the stringency of the safety rules and the environment in the EA. *See* J.A. 67, 98, 193, 201. The court of appeals properly addressed and decided the issue, as it plainly had the discretion to do. *See* Pet. App. 42a; *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977). This Court has long held that it will entertain arguments that were either pressed or passed on below. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992).

there should be no serious dispute that FMCSA was required to prepare an EIS.[18]

Further, FMCSA may have additional ways to mitigate the adverse effects of certifying Mexico-domiciled trucks to travel to interior points within the United States. For example, FMCSA could engage in cooperative agreements with other agencies, such as with the Environmental Protection Agency ("EPA") to include emissions inspections with its safety inspections. NEPA's requirement that the EIS consider alternatives, 42 U.S.C. § 4332(2)(C)(iii), is meant to stimulate agencies to identify and examine innovative options for protecting the environment. *See, e.g., Robertson*, 490 U.S. at 351-52; 40 C.F.R. § 1502.14.

The lower court cases petitioners rely on regarding agency discretion do not help them. *See* Pet. Br. 39. Every one involves a situation where the agency was stripped of all significant discretion over the challenged action.[19] In

[18] Indeed, given FMCSA's undoubted discretion over the stringency of the safety rules and the plain relationship between safety and environmental concerns, FMCSA should have prepared an EIS with respect to the environmental effects of various possible rules even in the absence of Section 350.

[19] *See Citizens Against Rails-to-Trails v. Surface Transp. Bd*, 267 F.3d 1144, 1151-53 (D.C. Cir. 2001) (agency was required to issue authorization); *Goos v. ICC*, 911 F.2d 1283, 1293-96 (8th Cir. 1990) (same); *City of New York v. Minetta*, 262 F.3d 169, 178 (2d Cir. 2001) (agency had no discretion regarding take-off and landing slot exemptions); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) (agency had no discretion about acquiring land); *American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 803 & n.11 (5th Cir. 2000) (agency lacked discretion over whether to allow increased flights); *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1425 (7th Cir. 1996) (agency had no discretion with respect to closure of airport); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512-13 (9th Cir. 1995) (agency had no discretion to modify construction of logging road); *Milo Cmty. Hosp. v. Weinberger*, 525 F.2d 144, 147-48 (1st Cir. 1975) (agency had no discretion over decertification of hospital).

contrast, where an agency has significant discretion it must prepare an EIS. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1985) (finding that even when Congress mandated contracts for power delivery, agency had discretion over content of contracts and had to prepare EIS). Given FMCSA's substantial discretion here, the agency action can hardly be termed ministerial.[20]

2. In addition to helping guide FMCSA's decision, an EIS would also perform an important informational role. Publication of an EIS "provides a springboard for public comment," and offers governmental entities other than the agency "adequate notice of the expected [environmental] consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. at 349-50; *see also Marsh*, 490 U.S. at 371 ("NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.").

An EIS would inform the public and other governmental bodies of the environmental issues implicated by allowing Mexico-domiciled trucks to travel into the interior of the United States. An EIS would also permit state and local authorities with responsibility for air quality control to determine what the effect of the trucks will be on compliance with air quality standards so that, *inter alia*, they can adjust requirements on other sources of the relevant pollutants accordingly. Moreover, an EIS would allow Congress, other governmental bodies, and the public at large to examine, and potentially implement, alternatives and mitigation measures outside of FMCSA's authority. Petitioners do not discuss any of this, but instead explain why in their view an EIS would

[20] Petitioners' assertion that "FMCSA did not have discretion to countermand any determination by the President that Mexican carriers would no longer be barred" (Pet. Br. 39) is irrelevant. The issue is whether FMCSA has discretion in its *own* rulemaking action, which it does.

not be helpful to the President alone. *See* Pet. Br. 36. That is simply not the standard.

3. Finally, the lower court's decision does not "contravene[] the 'rule of reason'" agencies employ in preparing their NEPA documents. Pet. Br. 37. Section 350 gave FMCSA control over environmental effects regardless of the President's decision on the moratorium. As petitioners' main case suggests, "[a]pplication of the 'rule of reason' . . . turns on the value of . . . information to the still pending decisionmaking process." *Marsh*, 490 U.S. at 374. An EIS is invaluable, for the reasons discussed above, in aiding FMCSA's decision to adopt the rules and how strict to make them, as well as bringing the environmental consequences of FMCSA's actions to the attention of the public and other governmental bodies.

Petitioners' complaints about the purported delays and monetary expense of preparing an EIS (*see* Pet. Br. 37-38) are meritless. FMCSA could have completed an EIS long ago had it properly fulfilled its responsibilities under NEPA. Moreover, an EIS is already well underway and could be complete as early as this summer. *See* Pet. Cert. 15 n.7; Resp. Br. Opp. Cert. 10. There is no evidence that FMCSA will save any money if it prevails here. More fundamentally, nothing in NEPA permits an agency to elevate the costs of an EIS above the potential harm to the environment and public health.[21]

IV. FMCSA MUST COMPLY WITH CLEAN AIR ACT CONFORMITY REQUIREMENTS

A. The Federal Government Cannot Allow Actions That Impinge On States' Ability To Meet Federal Air Quality Standards

The Clean Air Act was enacted to prevent pollution and to protect and enhance the quality of national air resources. 42

[21] Moreover, petitioners raised none of these arguments below, and the court of appeals did not address them. They are therefore waived.

U.S.C. § 7401. The CAA requires EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for air pollutants to protect the public health and welfare. 42 U.S.C. §§ 7409(a), (b); *see also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. ___, ___, 124 S. Ct. 983, 991 (2004); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 462, 465 (2001). Once EPA has promulgated NAAQS for particular pollutants, the "primary responsibility" for attaining and maintaining those standards shifts to the states. *E.g., Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *see also Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1012 (Kennedy, J., dissenting); 42 U.S.C. § 7401(a)(3). In particular, the states must promulgate State Implementation Plans ("SIPs") to attain and maintain the NAAQS. 42 U.S.C. § 7410(a); *see also Alaska Dep't of Environmental Conservation*, 124 S. Ct. at 991-92; *Union Electric*, 427 U.S. at 249-50. This requirement imposes a "lengthy and expensive task" on the states. *Whitman*, 531 U.S. at 479.

Congress provided the states broad discretion to determine how to meet the NAAQS. *See, e.g., Union Electric*, 427 U.S. at 266 ("So long as the national standards are met, the State may select whatever mix of control devices it desires."). But Congress was clear that those standards must be met. *See, e.g., Whitman*, 531 U.S. at 479; *Union Electric*, 427 U.S. at 249-50. The CAA imposes penalties on states that fail to attain and maintain the NAAQS by providing for limitations on federal funds for state highways and restrictions on new sources of pollution in nonattainment areas (42 U.S.C. §§ 7509(a), (b))—that is, areas that do not meet the NAAQS (*see General Motors Corp. v. United States*, 496 U.S. 530, 534 (1990)). Put another way, the CAA manifests Congress' "determination to tak[e] a stick to the states . . . to guarantee the prompt attainment and maintenance of specified air quality standards." *Union Electric*, 427 U.S. at 249 (internal quotation marks omitted; alteration in original).

Thus, the CAA "made the States and the Federal Government partners in the struggle against air pollution." *General Motors*, 496 U.S. at 532; *see also Alaska Dep't of Envtl. Conservation*, 124 S. Ct. at 1018 (Kennedy, J., dissenting). To ensure that the federal government holds up its end of the partnership and does not interfere with a state's efforts to comply with the CAA and thereby risk federally imposed sanctions, the CAA further provides: "No department, agency, or instrumentality of the Federal Government shall engage in, *support in any way* or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." 42 U.S.C. § 7506(c)(1) (emphasis added). Conformity means that the activities conform to a SIP's "purpose of eliminating or reducing the severity and number of violations of the [NAAQS]" and will not (i) *cause or contribute* to a new air quality violation, (ii) *increase the frequency or severity* of an existing violation, or (iii) *delay attainment* of any standard or required emission reductions or other milestones. 42 U.S.C. § 7506(c)(1).

In enacting the conformity requirement in 1977, Congress understood the threat that actions taken by federal agencies like FMCSA posed to state efforts to attain and maintain the NAAQS. The 1977 Senate Report concluded:

> The requirement that Federal licenses, permits, and other activities must conform to implementation plans may be one of the most important in assuring the eventual attainment of the ambient standards. Without the ability of a State or local planning agency to consider and provide for control of emissions from Federally licensed activities such as Outer Continental Shelf oil or gas leasing, it would be considerably more difficult for some areas to attain the oxidant standards.

S. Rep. No. 95-127, 95th Cong., 1st Sess. 40-41 (1977). As states would frequently be powerless to regulate federal activities directly, Congress imposed on federal agencies an

independent obligation to ensure that those federal activities were incorporated into the state planning process and did not make it more difficult for a state to conform to its federally mandated plan to achieve the CAA's air quality goals.

B. FMCSA Improperly Failed To Prepare A Conformity Analysis

The challenged rules fall directly under the "support in any way" provision of 42 U.S.C. § 7506(c)(1). EPA regulations governing the applicability of the conformity requirements to federal agency actions require federal agencies to make a determination that an action conforms to applicable SIPs under certain conditions. *See* 40 C.F.R. §§ 93.150(b), 93.154. In particular, the regulations require a conformity determination "where the total of direct and *indirect emissions*" in certain areas will exceed specified threshold levels. 40 C.F.R. § 93.153(b) (emphasis added). The regulations define "indirect emissions" to mean emissions that:

> (1) Are *caused by* the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and
>
> (2) The Federal agency can *practicably control* and will maintain control over due to a *continuing program responsibility* of the Federal agency.

40 C.F.R. § 93.152 (emphases added).

Despite these broad regulations, petitioners contend FMSCA need not perform a conformity analysis because the agency (i) cannot control the President's decision to lift the moratorium, (ii) has "no significant ability to control the emissions of Mexican motor carriers engaged in cross-border operations" and (iii), has no "continuing program responsibility" under 40 C.F.R. § 93.152 for those emissions. Pet. Br. 46. These arguments are misplaced.

First, whether or not FMCSA can control the President's action is irrelevant, as, once again, respondents are challenging FMCSA's separate action, not the President's action in lifting the moratorium. The statutory issue is whether FMCSA action would "support in any way" cross-border trucking. 42 U.S.C. § 7506(c)(1). In line with this broad language, EPA in 40 C.F.R. § 93.152 has defined "caused by" to mean "emissions that would not otherwise occur in the absence of the Federal action." 40 C.F.R. § 93.152. This regulation embraces the "condition precedent" analysis explicated with regard to NEPA. *See supra* at pp. 32-33. The emissions at issue "would not otherwise occur in the absence" of the challenged rules because Section 350 prohibits FMCSA from authorizing Mexico-domiciled trucks to travel into the interior of the United States in the absence of FMCSA meeting the congressional preconditions. Hence, emissions will be "caused by" the rules, although they "may occur later in time." 40 C.F.R. § 93.152.

Second, FMCSA *can* control emissions from Mexico-domiciled trucks. As respondents have shown, Section 350 gives control to the agency. In addition, FMCSA has the ability to increase or reduce emissions by making the safety standards more or less stringent, and thereby determine *how many* older, more heavily polluting, trucks will be allowed to travel into the interior of the United States. The agency need not have sole control over the activity, a conclusion that would read out of the statute the "support in any way" language.

Third, FMCSA has a "continuing program responsibility" under 40 C.F.R. § 93.152. The agency must conduct inspections and take such other actions that are necessary to enforce its rules after they have been properly promulgated. Indeed, under the Safety Monitoring Rule, during the time that Mexico-domiciled trucks retain "provisional" status, they are "subject to intensified monitoring through frequent roadside inspections." J.A. 185a-86a. The more effectively the agency enforces the safety requirements, the fewer heavily polluting Mexico-domiciled trucks will be allowed to

operate within the United States interior. Moreover, FMCSA has the continuing responsibility to reevaluate the regulations and make the safety restrictions more or less stringent based on practical experience.

EPA's regulations confirm this common-sense conclusion: "When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility." 40 C.F.R. § 93.152. The challenged rules, the promulgation of which is certainly part of FMCSA's normal program responsibilities, will "result in air pollutant emissions by a non-Federal entity taking subsequent actions" because the rules will result in Mexico-domiciled trucks traveling beyond the border zones and emitting pollution. Again, this is consistent with the extremely broad "support in any way" language of 42 U.S.C. § 7506(c)(1) and Congress' intent in enacting the conformity provisions to counter the serious threat to the ability of states to fulfill their federal obligations.

Accordingly, as petitioners do not dispute any of the other requirements for performing a conformity analysis, FMCSA was required to do so.[22]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

---

[22] Petitioners' suggestion that the court of appeals erred by requiring an EIS and conformity analysis rather than remanding for FMCSA to decide how to proceed (Pet. Br. 36-37 n.14) is meritless. First, it was not raised below and is therefore waived. Second, petitioners do not contest in this Court the court of appeals' findings concerning the potential serious environmental effects from cross-border trucking. *See* Pet. App. 31a-43a, 47a-48a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX

APPENDIX

Additional Provisions Involved

1. North American Free Trade Agreement Implementation Act

19 U.S.C. § 3312(a)(1) provides as follows:

> No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

2. National Environmental Policy Act

a. 42 U.S.C. § 4335 provides:

> The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

b. 40 C.F.R. § 1500.6 provides:

> Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

c. 40 C.F.R. § 1508.17 provides:

> *Legislation* includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not

include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

d. 40 C.F.R. § 1508.18 provides:

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

e. 40 C.F.R. § 1508.27 provides:

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific

action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant

impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

3. Clean Air Act

40 C.F.R. § 93.152 provides in part:

Caused by, as used in the terms "direct emissions" and "indirect emissions," means emissions that would not otherwise occur in the absence of the Federal action.

4. Section 348 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, 117 Stat. 11, 419, provides:

Funds appropriated or limited in this Act shall be subject to the terms and conditions stipulated in section 350 of Public Law 107-87, including that the Secretary submit a report to the House and Senate Appropriations Committees annually on the safety and security of transportation into the United States by Mexico-domiciled motor carriers.

5. Section 130 of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, 118 Stat. 3, 298, provides:

> Funds appropriated or limited in this Act shall be subject to the terms and conditions stipulated in section 350 of Public Law 107-87, including that the Secretary submit a report to the House and Senate Appropriations Committees annually on the safety and security of transportation into the United States by Mexico-domiciled motor carriers.

(15)

Supreme Court, U.S.
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No. 03-358

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents contend that provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), and the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1), require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate whether increased cross-border trucking following the President's decision to lift a moratorium on such operations by Mexico-domiciled commercial carriers (Mexican carriers) could adversely affect air quality. Respondents, however, fail to confront four critical considerations: (a) Congress has vested the President, rather than FMCSA, with responsibility for determining whether to open new United States markets to Mexican carriers; (b) FMCSA has no meaningful ability to mitigate any air quality consequences that may result from the President's decision, in response to the ruling by the international arbitration panel, to lift the moratorium on cross-border operations by Mexican carriers; (c) the NEPA evaluation respondents seek would not assist FMCSA in completing the challenged safety-related rulemaking; and (d) FMCSA has no practicable ability to control, for purposes of the CAA conformity requirement, any air-quality consequences that may result from the President's decision to

open United States markets to Mexican carriers. There is, in truth, no meaningful connection between FMCSA's regulatory authority over motor carrier safety and any air quality effects that might result from the President's decision to allow Mexican carriers to conduct cross-border operations. The court of appeals' decision to set aside FMCSA's safety rules—thereby delaying implementation of the President's decision—has no basis in law and represents an improper interference with the President's powers over foreign affairs and trade.

A. Congress Has Charged The President With Sole Responsibility To Decide Whether To Open United States Markets To Mexican Carriers

1. *Section 350 does not authorize FMCSA to exclude Mexican carriers on environmental grounds.* Respondents do not dispute that Congress has given the President responsibility, as part of his authority over foreign affairs and trade, to determine whether to open United States markets to Mexican carriers. See 49 U.S.C. 13902(c); Gov't Br. 21-23. Respondents contend, however, that Congress gave FMCSA separate authority over the access of Mexico-domiciled trucks to the United States through an appropriations rider, Section 350 of the Department of Transportation (DOT) and Related Agencies Appropriations Act, 2002 (Pub. L. No. 107-87, 115 Stat. 864) (reproduced at Gov't Br. App. 12a-20a). Supporting amici likewise describe Section 350 as a "grant of discretion" (see Cal. Br. 16), and argue that FMCSA exercises "independent control" over the entry of Mexican carriers to United States markets by "fulfilling the congressional preconditions" in Section 350. Defenders of Wildlife Br. 18. Those arguments rest on a mistaken understanding of Section 350's content and purpose.

Respondents acknowledge that Section 350 constitutes a "restriction" on FMCSA's authority to spend appropriated funds. See Resp. Br. 22. Respondents fail to recognize, however, that Section 350 operates in the context of the agency's

pre-existing regulatory powers. Under its enabling legislation, FMCSA has no authority to exclude Mexican carriers, as a class, from United States markets. To the contrary, FMCSA is obligated to register for United States operation any carrier, foreign or domestic, "willing and able" to comply with federal motor carrier safety rules. See 49 U.S.C. 13902(a). Only the President or his delegate may exclude Mexican carriers based on their nationality or Mexican domicile. See 49 U.S.C. 13902(c). The President has not delegated that trade authority to FMCSA or any other agency.

Consistent with the legislative limitations on its powers, FMCSA has not claimed any power to determine whether or under what conditions Mexican carriers should be allowed to operate in the United States. Rather, FMCSA initiated the rulemaking at issue in this case to fulfill the agency's statutory responsibility to register Mexican carriers that the President has determined should be allowed to operate in the United States. The rulemaking established procedures respecting motor carrier safety (specifically, application and monitoring requirements) for the agency to use in fulfilling that statutory obligation. As respondents now concede (Resp. Br. 32 n.11), FMCSA's rulemaking did not cause the President to make the decision—pursuant to his authority under 49 U.S.C. 13902(c)—to comply with the North American Free Trade Agreement (NAFTA) and open United States markets to Mexican carriers.

Respondents incorrectly insist that FMCSA is responsible for the environmental effects of the President's decision solely on the basis of Section 350. To be sure, Section 350 prohibited FMCSA from implementing the President's trade decision until that agency incorporated specific safety-related measures into its application and monitoring procedures for Mexican carriers. As a result, those carriers would not enter the United States, and no corresponding environmental consequences of their entry would result, until FMCSA completed its rulemaking. But Congress did not thereby give FMCSA "separate control over *whether* [cross-

border trucking by Mexican carriers] could occur." Resp. Br. 32 (emphasis added).

Congress has directed FMCSA to register any and all "willing and able" Mexican-carrier applicants that are made eligible, by Presidential decision, to operate in the United States. See 49 U.S.C. 13902(a). Section 350 does not empower FMCSA to veto the President's decision by withholding the issuance of registration requirements with which Mexican carriers must comply. Rather, Section 350 makes FMCSA responsible for imposing specific application and monitoring requirements—which Congress itself deemed necessary to ensure the safe operation of Mexican carriers in the United States—as part of FMCSA's statutory obligation to implement the President's decision.

Importantly, Section 350 does not empower FMCSA to place new conditions on the entry of Mexican carriers beyond the fundamental condition, imposed by Congress, that every carrier, foreign or domestic, seeking U.S. operating authority prove its willingness and ability to comply with motor carrier safety rules.[1] See 49 U.S.C. 13902(a). Section 350 simply mandates certain procedures governing the exercise of FMCSA's authority in applying this standard. Before the enactment of Section 350, FMCSA had broader discretion to determine the requirements that Mexican carriers

[1] In addition to the preconditions related to FMCSA's rulemaking, see generally Pub. L. No. 107-87, § 350(a), 115 Stat. 864, Congress also provided that FMCSA could not process applications by Mexican carriers until the DOT Inspector General conducted a review of border operations and the Secretary of Transportation certified to Congress, based on that border review, that "opening of the border does not pose an unacceptable safety risk to the American public." See § 350(c)(2), 115 Stat. 868. While those provisions authorized DOT to prevent the entry of Mexican carriers upon a determination that an "opening of the border" would present "unacceptable safety risks," DOT certified to Congress that there would be no unacceptable safety risk. Respondents do not challenge that certification. Thus, contrary to amici's suggestion (Cal. Br. 16 & n.3), the additional safety-related duties in Section 350 do not give FMCSA the authority "not * * * to act at all" with respect to registration of Mexican carriers.

would need to fulfill to prove their willingness and ability to comply with United States motor carrier safety rules. Under Section 350, FMCSA must adopt the procedures that Congress has dictated for Mexican carriers. See generally Pub. L. No. 107-87, § 350(a), 115 Stat. 864. While Congress left FMCSA with a narrow range of discretion in fashioning the final registration procedures, Congress did not empower FMCSA to change the fundamental condition for entry. Consequently, and contrary to amici's assertion (South Coast Air Quality Management District (SCAQMD) Br. 12), it is the actions of Congress and the President, not FMCSA's rulemaking, that will "shape" the characteristics of the Mexican truck fleet that will operate in the United States.

Because Section 350 does not augment FMCSA's regulatory authority, there is no basis for respondents' claim (Resp. Br. 23) that Section 350 made the entry of Mexican carriers contingent on further environmental review. Of course, FMCSA's rulemaking was subject to NEPA compliance obligations to the same extent that all final agency actions not categorically excluded (see generally 40 C.F.R. 1501.4) are subject to those obligations. But the specific issue here is whether an Environmental Assessment (EA), which FMCSA began before enactment of Section 350, was (and remained) sufficient to satisfy FMCSA's NEPA obligation.[2] Because Section 350 did not enlarge the scope of FMCSA's authority or the reach of its rulemaking, FMCSA reasonably determined that Congress did not intend any additional environmental analysis. If Congress had intended to require further analysis, Congress could have easily written that requirement into Section 350. But Congress took no such action. Section 350 required FMCSA (and DOT) to complete numerous specific tasks with respect to motor

[2] FMCSA initially determined that an EA was not necessary for the proposed rules, see 66 Fed. Reg. 22,377 (2001) and 66 Fed. Reg. 22,418 (2001), but the agency changed its position before Congress enacted Section 350. See J.A. 57. Contrary to respondent's suggestion (Resp. Br. 6-8), FMCSA did not prepare an EA in response to that legislation.

carrier safety, but Section 350 did not once mention NEPA, FMCSA's ongoing NEPA review, the CAA, or environmental concerns relating to vehicle emissions.[3]

2. *Congress did not ratify the court of appeals' ruling.* There is also no merit to respondents' argument (Resp. Br. 26-30) that Congress manifested an intent to require further environmental review by reenacting Section 350 after the court of appeals' ruling. The legislation extending the terms of Section 350 to DOT's 2004 appropriation, see Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 298, was accompanied by committee reports noting that the Ninth Circuit had set aside the rules mandated in Section 350. See S. Rep. No. 146, 108th Cong. 1st Sess. 69-70 (2003); H.R. Rep. No. 243, 108th Cong., 1st Sess. 81 (2003). But Congress did not change the terms of Section 350 in the 2004 legislation or the earlier "reenactment" of Section 350 for fiscal year 2003, see Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 298 and Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419. The Senate and House reports express no opinion on the merits of the Ninth Circuit's ruling. Consequently, the apparent intent of Congress was simply to retain the safety requirements dictated by Section 350, while FMCSA's rulemaking (and thus the

[3] While Section 350 requires FMCSA to ensure Mexican-carrier preparedness "to comply with * * * Hazardous Materials rules and regulations," see Pub. L. No. 107-87, § 350(a)(1)(B)(v), 115 Stat. 864, the reference to those rules, which are within DOT's own substantive safety jurisdiction, does not support amici's suggestion (Defenders of Wildlife Br. 20) that FMCSA had—or was given in Section 350—authority over environmental issues concerning Mexican trucks generally or the particular air-quality issues in this case. In proceedings below, respondents never argued, and the court of appeals never found, that FMCSA failed adequately to consider hazardous-materials issues. Amici's attempts now to assert unfounded hazardous-materials claims (*id.* at 22), as well as unfounded claims about truck safety and drug trafficking (Eagle Forum Education & Legal Defense Fund Br. 14-21), are inappropriate and without merit.

final content of the rules) remained unfinished and this litigation ran its course.

Moreover, even if Congress's reenactment of Section 350 could somehow be viewed as an endorsement of the court of appeals' ruling, that supposed endorsement is entitled to no weight. In determining that FMCSA was obligated, before promulgating the challenged rules, to prepare an EIS and a CAA conformity analysis of the effects of the President's decision to open U.S. markets to cross-border trucking, the court of appeals relied on its finding that the President's decision was "reasonably foreseeable" and its determination (in the context of its decision on standing) that Section 350 provided bare "but for" causation between promulgation of the rules and implementation of the President's decision. See Pet. App. 30a-31a, 47a, 19a-23a. The court of appeals did not determine—as respondents and their amici now erroneously contend (Resp. Br. 32; see Cal. Br. 16)—that Section 350 gave FMCSA discretion to determine whether Mexican carriers may engage in cross-border trucking or that Section 350 itself required FMCSA to engage in further environmental analysis.[4]

Respondents' reliance on the "ratification doctrine" (Resp. Br. 26) is accordingly misplaced. When called upon to discern the meaning of statutory language that Congress has reenacted in the wake of "consistent judicial construction," the Court may presume that Congress intended to adopt that construction. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). But in this case, the statutory language that Congress re-

[4] As explained in the government's opening brief (Gov't Br. 30-40, 45-47), the court of appeals' failure to address FMCSA's lack of discretionary control over the environmental effects at issue constitutes the fundamental error in the court's analysis. By ignoring that issue, the court of appeals effectively treated the agency's lack of discretion as irrelevant for NEPA and CAA purposes. Respondents make no effort to defend that position, which is clearly contrary to established law. See *id.* at 39.

enacted—Section 350—played no relevant part in the court of appeals' analysis of FMCSA's substantive obligations. Rather, the court of appeals reasoned that NEPA and the CAA themselves obligated FMCSA to conduct additional environmental analysis. Thus, even if the legislative reports could be construed as endorsing the Ninth Circuit's ruling (which they did not), those reports could be viewed as endorsing only a suspect interpretation of *other* pre-existing legislation—NEPA and the CAA—that was not then before Congress. See *Central Bank of Denver*, 511 U.S. at 185 ("[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.").

B. FMCSA Does Not Have Any Meaningful Ability To Mitigate Air-Quality Impacts That May Result From The President's Trade Decision

1. *Respondents' mitigation arguments are untimely.* Respondents contend, as an alternative to the assertion that FMCSA has a discretionary role in causing the opening of United States markets to Mexican carriers and the attendant environmental effects, that FMCSA is responsible for the environmental effects of the President's trade-liberalization decision because the agency can "mitigate" those effects through its rulemaking. See Resp. Br. 38-42; see also Defenders of Wildlife Br. 20-22; Cal. Br. 17-19. According to respondents, FMCSA could have chosen alternatives to the challenged rules that would offset increases in the air pollution that respondents allege will result from the President's decision, and FMCSA is therefore responsible under NEPA for analyzing, and under the CAA for evaluating and controlling, all the effects of the President's decision. That claim, however, is unsound at the threshold because it was not raised in a timely manner and therefore is not properly before the Court.

As explained in the government's opening brief (Gov't Br. 27-29), respondents did not urge, either in their comments submitted during administrative proceedings before FMCSA or in their initial court of appeals' brief, that FMCSA should adopt or study rulemaking alternatives beyond those evaluated in FMCSA's EA. Respondents now insist (Resp. Br. 40)—without even now identifying any particular alternatives—that because FMCSA "could * * * enact[] more restrictive safety measures that would also mitigate the environmental effects of [Mexican] trucks operating throughout the United States," an EIS is necessary to study such unidentified alternatives. *Ibid.*; see Cal. Br. 27-28; Defenders of Wildlife Br. 10. Respondents' belated claim warrants no consideration by this Court. Because respondents failed to raise that claim when FMCSA was considering its rules, FMCSA was not given the opportunity to explain, as part of the administrative record, that there are no such alternatives reasonably available to FMCSA.

It is "black-letter administrative law" that, absent special circumstances, courts will not consider objections to an agency's actions that were not raised during administrative proceedings. *Appalachian Power Co.* v. *EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001). Indeed, in the specific context of NEPA, this Court has made clear that persons challenging agency compliance with NEPA have a responsibility, during administrative proceedings, to "structure their participation so that it * * * alerts the agency to the [parties'] position and contention," to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). Respondents give no explanation for their failure to urge different alternatives during administrative proceedings. Rather, after failing to give FMCSA a reasonable opportunity to respond to their claim—either during administrative proceedings or even in the initial briefing below—respondents now erroneously assert to this Court that FMCSA "do[es] not dispute" the availability of reasonable "mitiga-

tion" alternatives. Resp. Br. 40 n.17. As explained below, FMCSA does dispute that claim. But the Court should reject that claim outright because respondents never gave FMCSA a reasonable opportunity to address it during administrative proceedings.[5]

2. *Respondents' mitigation argument is without merit.* If the Court reaches respondents' claim that FMCSA could impose additional measures to mitigate emissions from Mexican carriers, the Court should reject it. Respondents overlook the critical fact that FMCSA is responsible for administering and enforcing motor carrier *safety* rules, and not for regulating vehicle emissions that might impair air quality. See, *e.g.*, J.A. 51-52 (describing the scope of FMCSA's regulatory authority). FMCSA's elaborate and detailed regulations, which focus on the safe design and operation of commercial motor vehicles, do not include environmental standards for vehicle emissions. See generally 49 C.F.R. Pts. 350-399.[6]

Congress has mandated, through the CAA's "mobile-source" program (42 U.S.C. 7521 *et seq.*), manufacturing standards for vehicles and vehicle engines sold within or imported into the United States, to control emissions from these sources. See 42 U.S.C. 7522(a)(1); see also 40 C.F.R. Pt. 86 (emissions standards). However, EPA—and not FMCSA—enforces those standards. Further, the CAA con-

[5] Respondents have essentially no answer to this waiver argument. The only authority they cite for the proposition that they may urge other alternative safety rules before a reviewing court, even though they did not make that argument before FMCSA, is an appellate decision that predated this Court's decision in *Vermont Yankee*. See Resp. Br. 40 n.17.

[6] Amici argue that FMCSA regulates vehicle "exhaust" (Defenders of Wildlife Br. 20), but the cited regulation—49 C.F.R. 393.83—actually regulates exhaust *systems* for safety purposes; i.e., to ensure that engine exhaust is not vented in a location that could cause fire or otherwise harm vehicle passengers. The fact that FMCSA can and must require Mexican carriers, as well as all domestic carriers, to comply with that equipment-safety standard does not demonstrate that FMCSA has authority to regulate the constituents of vehicle exhaust for air-quality purposes.

tains no specific restrictions on foreign-domiciled carriers (either Mexican or Canadian) that transport goods between their home countries and the United States in trucks purchased and maintained outside the United States. And respondents do not contend that the CAA's general mobile-source standards, as implemented by EPA, apply to such trucks. To the contrary, respondents' principal claim of environmental harm—that the opening of new United States markets to cross-border operations by Mexican carriers will increase domestic air pollution—is predicated on the notion that Mexican carriers will operate trucks that were not (and will not be) manufactured to United States emission standards. See, *e.g.*, Resp. Br. 10; SCAQMD Br. 16-19; American Public Health Association (APHA) Br. 17; Defenders of Wildlife Br. 4; Cal. Br. 3.[7]

Absent any basis for concluding that FMCSA can regulate vehicle emissions, respondents are left to argue that FMCSA can control emissions from Mexican carriers indirectly: (a) by making the safety-registration process "more onerous"; or (b) by removing older more polluting trucks through more effective enforcement of motor-carrier safety standards. See Resp. Br. 9, 40. Those arguments are unsound. The former claim is predicated largely on FMCSA's statement in the EA for the challenged rules (J.A. 66-67) that, when compared to taking no action (i.e., registering Mexican carriers under pre-existing rules), imposing heightened procedural requirements on Mexican carriers could "deter" some applicants and thereby incrementally reduce the number of Mexican trucks that will operate in the United States. In making this observation, FMCSA did not state that the deterrent effect would be significant for air-quality purposes, or that there were additional application and monitoring requirements that

[7] For this reason, respondents' claim (Resp. Br. 41) that FMCSA can address emissions from Mexican carriers by "engag[ing] in cooperative agreements with other agencies, such as * * * the [EPA], to include emissions inspections with [FMCSA's] safety inspections," is internally inconsistent.

FMCSA could reasonably impose on Mexican carriers above and beyond the already heightened requirements in the proposed rules. Because FMCSA cannot exclude Mexican carriers that are willing and able to meet federal motor carrier safety rules, see 49 U.S.C. 13902(a), the agency cannot make its registration rules more stringent than necessary to achieve that safety objective. Significantly, respondents do not contend that additional restrictions are necessary for purposes of motor-carrier safety.

Respondents also fail to show that there is any meaningful correlation, much less an "extremely close connection" (see Resp. Br. 34), between enforcement of motor carrier safety rules and mitigation of the alleged environmental harms in this case. In suggesting that connection (*id.* at 40; see Defenders of Wildlife Br. 22), respondents rely on FMCSA's statement—in its court of appeals brief (J.A. 484)—that the heightened procedural requirements in the challenged rules would "tend to restrict" the number of older trucks used by Mexican carriers in cross-border operations. FMCSA based that statement on the commonsense notion that older trucks may be more likely than newer trucks to have equipment-safety problems. FMCSA did not determine, nor have respondents otherwise shown, that most older Mexican trucks have equipment-safety problems or that stricter enforcement of equipment-safety rules (which would apply in any event) would significantly alter the age distribution (and emissions profile) of trucks in the Mexican cross-border fleet.[8] The emissions profile would change only if safety

[8] Because Mexico did not mandate emission standards for truck engines sold in Mexico until 1993 (J.A. 356), several years after the United States adopted such standards, trucks sold in Mexico prior to 1993 might emit more pollutants than their United States counterparts. Some older Mexican trucks, however, may have been originally sold in the United States to United States carriers and, thus, have been manufactured to United States pollution control standards. Between 1993 and 2003, Mexico and the United States subjected truck engines sold within their respective borders to the same standards. *Ibid.* The United States since has adopted new and more stringent standards to go into effect between 2004 and 2007, which Mexico has not yet adopted. See *ibid.*; J.A. 484-485.

enforcement caused a significant reduction in the use of older trucks, as opposed to simply compelling improved maintenance of such trucks. Moreover, respondents do not dispute FMCSA's finding, in its EA, that increased safety enforcement can have a negative impact on emissions control. J.A. 164-165. In particular, more frequent roadside inspections of Mexican carriers for safety purposes will increase engine-operation time and, to that extent, increase emissions in the United States. *Ibid.*

Ultimately, there is no reason to believe that more stringent registration rules would both be appropriate in the context of FMCSA's statutory duty to register all willing-and-able applicants and significantly affect the claimed air-quality consequences from the Mexican carriers' operations. For example, amici cite potential air-quality impacts of cross-border trucking in future years in southern California and other border areas, but they attribute those impacts largely to the fact that Mexican carriers might not be subject to California's low-sulphur fuel requirement or progressively tighter United States emissions standards that go into effect between 2004 and 2007. See SCAQMD Br. 17-19; Cal. Br. 3; APHA Br. 17-19, 23; see also J.A. 379-380. Respondents do not contend that tighter enforcement of motor-carrier safety standards—through additional (and as-of-yet unidentified) application or inspection registration requirements—could meaningfully address those specific air-quality impacts.

C. Preparation Of An Environmental Impact Statement Evaluating The Effects Of Cross-Border Trucking Would Not Assist FMCSA In Its Rulemaking

Congress enacted NEPA to improve agency decisionmaking by "inject[ing] environmental considerations into the federal agency's decisionmaking process." *Weinberger* v. *Catholic Action of Haw.*, 454 U.S. 139, 143 (1981); see *Rob-*

ertson v. *Methow Valley Citizens Council*, 490 U.S. 343, 349 (1989). The court of appeals' order requiring FMCSA to prepare an EIS evaluating the effects of cross-border trucking would not enhance FMCSA's rulemaking because, as the government explained in its opening brief (Gov't Br. 35-36), FMCSA has no role to play in that trade-policy decision, which rests with Congress and the President.[9]

The government has already addressed the flaws in respondents' untimely—and waived—claim that an EIS is necessary to help FMCSA develop alternatives to the challenged rules. See pp. 10-13, *supra*. Faced with the absence of any basis to argue that an EIS would provide information meaningful to FMCSA's rulemaking, respondents and the amici are left to argue that an EIS should be required because its preparation would not be impossible, see Cal. Br. 24, and because an EIS might provide useful information for Congress and government agencies other than FMCSA, Resp. Br. 42-43; SCAQMD Br. 17; Cal. Br. 26-27; Defenders of Wildlife Br. 23-25. Those arguments are without merit.

First, this Court's holding that an agency is excused from NEPA compliance where a statutory conflict renders compliance impossible, see *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 787-790 (1976); see also 40 C.F.R. 1500.6 (same), does not mean that federal agencies are otherwise obligated to prepare an EIS whenever possible. The threshold question is always whether the agency's proposed action will "significantly affect" the environment. 42 U.S.C. 4332(2)(C). As the government explained in its opening brief (Gov't Br. 39), the courts of appeals have uniformly held that, where an agency does not have discretionary control over actions that may cause adverse effects, the effects cannot be deemed the result of *agency* action for NEPA purposes. See, *e.g.*, *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (stating that "[t]he touchstone of whether NEPA applies is discretion"). Contrary to respondents' assertion (Resp. Br. 41), this is a case in which FMCSA clearly lacks "significant discretion over the challenged action"—*viz.*, the President's decision to allow cross-border trucking.

Second, while this Court has observed that NEPA was designed to serve a "larger informational role," see *Robertson*, 490 U.S. at 349, the Court explained that the core purpose of providing information to the public and other interested agencies is to allow the "larger audience [to] play a role in * * * the [agency's] decisionmaking process." *Ibid.* This Court has never held—nor do respondents cite any case holding—that an agency must prepare an EIS where there is no reasonable expectation that the EIS will influence, or will be material to, the agency's decisionmaking. Contrary to respondents' assertion (Resp. Br. 36), this case does not present the common situation in which a federal agency has partial control, along with state or private actors not subject to NEPA, over an action that will have environmental effects. Rather, this case presents a situation in which the relevant federal agency has no meaningful control over the activity in question. The actors with control over the opening of United States markets to cross-border trucking by

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[9] FMCSA fully evaluated the air-quality and other environmental impacts of its own rulemaking—as distinguished from the President's action—and made a finding of no significant impact (FONSI). Contrary to the assertion of amici (SCAQMD Br. 15-16), the adequacy of FMCSA's EA and FONSI in that respect is not before this Court. Although the court of appeals stated that the EA suffered from various methodological flaws, including errors in emissions modeling (Pet. App. 37a-39a), the court made those statements in the context of its overriding determination (*id.* at 30a-31a) that FMCSA was responsible for evaluating all emissions attributable to the President's action in lifting the moratorium and opening the border. Significantly, the court never addressed FMCSA's argument (J.A. 487-488) that the professed methodological flaws were not defects when viewed in the context of FMCSA's limited obligation to analyze the emissions effects of its rulemaking. Nor did respondents challenge that argument in their briefs below. Thus, the question before this Court is simply whether FMCSA acted arbitrarily and capriciously in limiting the scope of its EA to matters within the scope of its own discretion in conducting the rulemaking.

Mexican carriers—the Congress and the President—are expressly exempt from NEPA. See 40 C.F.R. 1508.12.

The court of appeals' decision has not improved FMCSA's own decisionmaking process on the narrow vehicle safety issues before it. Instead, the court's decision has interfered with a joint congressional-executive judgment respecting an important and sensitive matter of foreign relations and trade policy. If allowed to stand, the court's decision would not inject any relevant environmental consideration into the agency's designated decisionmaking role. Rather, it would inject needless confusion, expense, and delay.

D. FMCSA Was Not Required To Conduct A Conformity Review Under The Clean Air Act

Respondents incorrectly assert that the CAA requires this Court to determine, under 42 U.S.C. 7506(c)(1), whether FMCSA's rulemaking can be seen to "support in any way" an activity (the opening of United States markets to cross-border trucking by Mexican carriers) that respondents contend "does not conform" to an applicable state implementation plan (SIP). See Resp. Br. 47; see also Cal. Br. 15. As the government has explained (Gov't Br. 45-47), EPA has issued regulations that define, for federal agencies, what it means to "support" an activity for purposes of the conformity requirement. See 40 C.F.R. 93.150-93.160; see also *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214 (1993). Those regulations, which respondents do not challenge and which have been upheld by the D.C. Circuit, are entitled to deference. See *Environmental Defense Fund, Inc.* v. *EPA*, 82 F.3d 451, 464 (per curiam), amended, 92 F.3d 1209 (1996). The relevant question, accordingly, is whether FMCSA's decision not to perform a conformity analysis reflects a proper understanding of EPA's conformity regulations.

FMCSA's decision is firmly supported by EPA's regulations. The regulations state that an agency is not responsible for indirect emissions that are caused by the agency's actions if the emissions are beyond the agency's "practicable control" and "program responsibility." 40 C.F.R. 93.152 (definition of "indirect effects"). Under that test, emissions from Mexican carriers operating in the United States as a result of the President's trade decision can be attributed to FMCSA's rulemaking only if FMCSA can practicably control those emissions through its ongoing authority over motor carrier safety. As already demonstrated (p. 2-6, *supra*), FMCSA can exercise no such control. Contrary to the claims of respondents and amici (Resp. Br. 47; Defenders of Wildlife Br. 28), FMCSA's ongoing control over Mexican-carrier safety (through registration, inspections, and audits) does not equate to control over vehicle emissions.[10]

Respondents' reliance (Resp. Br. 48) on EPA's definition of "continuing program responsibility" is equally misplaced. The definition states in full:

> *Emissions that a Federal agency has a continuing program responsibility for* means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal agency. When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

[10] In contrast, FMCSA does exercise continuing program control over emissions resulting from the increased safety inspections called for in the challenged rules. As explained in the government's opening brief (Gov't Br. 14), FMCSA determined that emissions attributable to increased safety inspections will be below the regulatory thresholds that trigger the obligation to perform a conformity analysis. See Pet. App. 65a-66a, 155a. Respondents do not challenge that determination. Likewise, in asserting that emissions will exceed relevant regulatory thresholds (APHA Br. 23; SCAQMD Br. 20), amici focus on emissions from cross-border trucking and not emissions from motor-carrier safety inspections.

40 C.F.R. 93.152. Quoting only the second sentence of this definition, respondents assert that FMCSA is responsible for emissions by Mexican carriers that are eligible to operate in the United States as a result of the President's decision, because the promulgation of the safety regulations is part of FMCSA's "normal program responsibilities" and will "result in air pollution emissions by a non-Federal entity taking subsequent actions" (i.e., Mexican-domiciled trucks crossing the border and emitting pollution). Resp. Br. 48.

The regulation respondents quote, read as a whole, in fact refutes their position. Looking to the first sentence of the regulation, any emissions by Mexican trucks in the United States are not "specifically caused" by FMCSA. FMCSA itself does not take any action (except for roadside inspections) that "cause" such emissions in the "specific" sense necessary to place them within FMCSA's continuing program responsibility, and any "activities" by the carrier that occur "subsequent" to registration—i.e., any actual entry of the carrier's trucks into the United States, the selection of routes they travel, and any emissions that occur—are not "required" by FMCSA. Looking to the second sentence, which is an elaboration of the first, FMCSA does not "take actions itself" (again, except for roadside inspections) that result in air pollutant emissions, because FMCSA's issuance of regulations and approval of applications do not themselves result in pollution. Nor does FMCSA "impose[] conditions" (i.e., requirements) on the subsequent operations of Mexican carriers that result in such emissions; the conditions FMCSA imposes are directed to safety issues. See *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214, 63,221 (1993) ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity, either because there is no continuing program responsibility or

ability to practicably control."); *ibid.* (federal agency has no responsibility to attempt to limit emissions that are outside its "legal control" or to "leverage" its own legal authority to influence or control nonfederal activities that it cannot practicably control, are not subject to continuing program responsibility, or that lie outside the agency's own legal authority); see generally *id.* at 63,219-63,224.

The amici States posit (Cal. Br. 19-21) that FMCSA could obtain emissions reductions from other sources to offset any emissions increases resulting from the President's decision to open United States markets to cross-border trucking by Mexican carriers. Because the President is not subject to the conformity requirement (see Gov't Br. 47-48)—a matter that respondents do not dispute—FMCSA cannot be compelled to make the President's action conform. And FMCSA itself has no continuing responsibility for emissions by Mexican trucks that could trigger any occasion for FMCSA to try to obtain emission offsets. Tellingly, moreover, amici identify nothing that FMCSA could do within its regulatory authority to obtain emissions offsets. Rather, amici argue (Cal. Br. 20-21) that FMCSA could go to Congress for relief, apparently for funds to purchase emissions reductions (pollution credits) from "private sources" or for the authority to barter for emissions reductions from other federal agencies or programs. Nothing in the CAA required FMCSA to go to such extraordinary lengths before fulfilling its statutory duties over the limited subject of truck safety.

At bottom, respondents and their amici would transfer control over important foreign policy and trade issues from Congress and the President to individual agencies and the courts. Congress and the President have determined that the United States should open United States markets to cross-border trucking by Mexican carriers. If that decision has any significant effect on United States air quality, the principal reason will be the different emission characteristics of United States trucks and Mexican trucks used in cross-border transportation. See J.A. 379-380, 388; see also Defen-

ders of Wildlife Br. 4; APHA Br. 18-19). FMCSA's regulations addressing vehicle safety issues can prevent vehicle accidents that might arise from allowing Mexican carriers to engage in cross-border trucking, but they cannot resolve the environmental issues that may arise from that trade policy decision.

As respondents acknowledge, Congress has authority, not affected by NAFTA, to require foreign carriers to meet United States environmental standards as a condition of entry into United States markets. Resp. Br. 22. If, in accord with the arguments of respondents' and their amici, Congress has not required foreign cross-border carriers to operate trucks manufactured to United States emissions standards (or their equivalent) as a condition of entry to United States markets, respondents' remedy rests with Congress, and not in setting aside motor-carrier safety procedures with which respondents have no identified substantive quarrel.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2004

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No. 03-358

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 03-358

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For more than twenty years it has defended American sovereignty. EFELDF has consistently opposed the abdication of authority by American governmental entities to newly created international institutions. EFELDF promotes adherence to the U.S. Constitution and respect for the obligations

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

and power that it mandates for the federal government free from control by global entities. EFELDF has repeatedly taken a stand against delegation of power by any American governmental entity to an international tribunal.

Amicus has a direct and vital interest in the issues presented to this Court based on its longstanding defense of American sovereignty.

SUMMARY OF ARGUMENT

North American Free Trade Agreement (NAFTA) is being tested here for the first time. Implicitly at stake is whether congressional bypass of the Treaty Clause, Article II, Section 2, can trump federal law in favor of a decision by an international tribunal. On February 6, 2001, a five-member foreign panel mandated that the United States lift its restrictions on Mexican trucks and allow them full access. Though NAFTA could not be ratified by the Senate as required by the Treaty Clause, the tribunal repeatedly referred to NAFTA as a "treaty" and purported to enforce it as such. The Administration has arbitrarily and capriciously ignored applicable federal law in adhering to that decision.

In creating an international tribunal and then ignoring domestic obligations in submitting to that tribunal, NAFTA implementation has gone overboard. In the first fifty years after ratification of the Constitution, the vast majority of international agreements complied with the Treaty Clause. But since World War II, over 90% of international agreements have ignored that constitutional requirement. Unchecked, the agreements have assumed increased power, as exemplified by the contemplated invasion of Mexican trucks in the case at bar. It is time to reaffirm limits on congressional-executive agreements that were never properly ratified as treaties.

The judiciary abdicates its responsibilities if it allows international tribunals to usurp adjudicative power. Vigilant

in invalidating congressional expansion in jurisdiction of Article I courts, this Court should likewise strike down congressional submission to international tribunals that dictate domestic issues such as use of our highways. Congress cannot create or endorse a new adjudicative entity to wield power over domestic issues. At a minimum this violates the separation of powers inherent in our constitutional system. If allowed, the erosion of the judiciary in the face of global tribunals could dramatically worsen.

The Ninth Circuit correctly required the Department of Transportation to comply fully with domestic laws before allowing Mexican trucks to travel on our highways and byways. An environmental impact statement must be prepared. It should include not only the adverse effect of the trucks on nature, but also on human safety. It should analyze not only the pollution caused by truck emissions, but also the loss of life through accidents. Mexican trucks are older and more dangerous than domestic trucks, and their drivers are less familiar with our roads and our language. The resulting loss of life from a predictable increase in accidents must be part of the requisite environmental impact statement.

ARGUMENT

The Ninth Circuit properly found that a federal agency had failed to comply with federal law, and had acted arbitrarily and capriciously in violating the National Environmental Protection Act (NEPA) and the Clean Air Act (CAA). The court was right in remanding the case to the Department of Transportation with instructions to comply with those laws. Simply put, the Department adhered to an international tribunal opinion at the expense of domestic law. Such agency action must be reversed.

Though the government maintains that admitting Mexican trucks is within executive discretion, in fact it adhered to an international tribunal never authorized by any treaty. The

arbitral panel established by NAFTA encroaches impermissibly on the sovereignty of our domestic laws and institutions. By effect if not design, the executive branch has become subservient to the judicial decisions of a tribunal lacking in constitutional authority. The tribunal was neither established under the Treaty Clause nor pursuant to a recognized congressional power. Rote implementation of its decision must be invalidated.

Finally, the requisite environmental impact statement must address the impact on human lives, not merely the impact on nature. Life-threatening and fatal accidents caused by older trucks like those in Mexico should be analyzed and included in the statement. Deaths caused by language incompatibility, such as misunderstanding directions or road signs, are an essential aspect of this required analysis. An analysis of the indirect harm caused by increased pollution must accompany a study of the threat of direct harm to men, women and children. Increased drug trafficking should also be included in the impact statement.

Allowing tens of thousands of hazardous Mexican trucks on American roads is not a "foreign affairs action" exempt from application of domestic laws. The decision below should be affirmed.

I. NAFTA, AS ENACTED BY CONGRESS, DOES NOT AUTHORIZE PRESIDENTIAL BYPASS OF DOMESTIC LAW TO ADHERE TO A DECISION OF AN INTERNATIONAL TRIBUNAL.

NAFTA, as enacted by a simple majority in Congress, did not repeal the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C), or the Clean Air Act (CAA), 42 U.S.C. § 7506(c)(1). 19 U.S.C. § 3311. To the contrary, Congress expressly mandated that "[n]o provision of the Agreement . . . which is inconsistent with any law of

the United States shall have effect." 19 U.S.C. § 3312(a)(1). Moreover, Congress prohibited any construction of NAFTA that would "amend or modify any law of the United States, including any law regarding . . . the protection of human, animal, or plant life or health [or] the protection of the environment." *Id.* § 3312(a)(2). *See Barker v. Harvey*, 181 U.S. 481, 488 (1901) ("'[S]o far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which *the court is bound to follow the statutory enactments of its own Government.*'") (quoting *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889), emphasis added).

This Court has emphasized that our border security cannot be surrendered, and surely not by a mere congressional-executive agreement:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. . . . [The powers of exclusion] cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.

Chae Chan Ping v. United States, 130 U.S. 581, 606, 609 (1889). NAFTA cannot compel the opening of our borders to hordes of Mexican trucks.

The President may not bypass domestic law in attempting to comply with an international tribunal pursuant to NAFTA. "Almost immediately after the arbitrators' decision, President Bush made clear his intention to lift the moratorium on cross-border operations following the preparation of new regulations governing grants of operating authority to Mexican

motor carriers, **in order to comply with NAFTA** and promote trade between the United States and Mexico." Govt. Br. at 7 (citing Pet. App. 10a; J.A. 53; Pet. 5 & n.2, emphasis added). The Bush Administration announced that "we have assured the Mexican government that we intend to live up to our NAFTA obligations to open the U.S.-Mexico border to trucking [and] discussions are underway on how to implement the recent NAFTA Panel decision in a safe and orderly fashion." Alan Larson, "Outlining the Potential for Expanded US-Mexico Trade," Remarks to 54th Plenary of the Mexico-U.S. Business Committee (Mar. 5, 2001).[2]

The Administration seeks to ignore the APA, NEPA and CAA in the name of "foreign relations" and "foreign trade," phrases it invokes repeatedly in its brief before this Court. Govt. Br. at I, 2, 3, 18, 22, 23, 35. That argument may invite support in connection with a military conflict abroad or even an economic dispute in a foreign land. When the presidential action is directed outside of the borders of the United States, then there is little reason for the foregoing restraints on administrative action. But here the action is directed at domestic highways entirely within the United States, and even at intrastate roads. Invocation of a desire to improve foreign relations is no excuse for bypassing domestic legal requirements. *See, e.g., Taylor v. Morton*, 23 F. Cas. 784, 785, 2 Curt. 454 (D. Mass. 1855), *aff'd*, 67 U.S. 481 (1863) ("The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is exclusively, for the consideration of the United States.").

The government cannot justify its failure to comply with NEPA and CAA in opening the borders to Mexican trucks by

[2] http://www.state.gov/e/rls/rm/2001/1133pf.html (visited Apr. 16, 2002).

relying on 49 U.S.C. § 13902. That statute permits the President or his delegate to combat discriminatory practices by foreign countries against United States transportation companies by restricting access from those foreign countries. Section 13902(c), for example, expressly targets "[p]revention of discriminatory practices" by foreign countries and mandates "[e]qualization of treatment" for domestic companies. "Any action taken under [Section 13902(c)(1)(A)] to eliminate an act, policy, or practice shall be so devised so as to equal to the extent possible the burdens or restrictions imposed by such foreign country on United States transportation companies." 49 U.S.C. § 13902(c)(2). But that provision is designed to protect domestic transportation companies, not subject them to a foreign invasion using workers paid less than the minimum wage. Nothing in Section 13902 allows the Department of Transportation to open the borders in violation of the NEPA and CAA.

The government brief distorts this statute by changing its remedial purpose—to combat discrimination by foreign countries against United States transportation companies—into a blanket presidential authority to ignore domestic law. In fact, the Section 13902(c)(3) grant to the President of authority to modify the moratorium only applies to actions taken under "paragraph (1)(A)", which consist of responses to discriminatory actions taken by foreign nations against United States transportation companies. 49 U.S.C. § 13902(c)(3). No such discrimination is the cause of the Administration's action here, and thus it cannot be justified as a remedy for domestic transportation companies faced with discrimination by a foreign power.

The government insists that opening the borders "was the result of the joint exercise by Congress and the President of their constitutional responsibilities for foreign trade and foreign relations, and was made in accordance with NAFTA obligations and pursuant to statutory provisions vesting trade

authority directly in the President." Govt. Br. at 3. But who drives on U.S. highways is surely a domestic rather than "foreign" issue. Moreover, the government cannot create a new loophole for avoiding statutory restraints on administrative action by having the President issue an administrative rule directly. This is unavailing because numerous administrative actions are essential to implement a presidential directive, and those actions may be properly challenged.

This lawsuit is not against the President, and the court below did not order or enjoin the President. "The President of the United States is not a party to this action, and the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c)." *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1020 (9th Cir.), *cert. granted*, 124 S. Ct. 957 (2003). The court observed that "neither the validity of nor the United States' compliance with NAFTA is before us." *Id.*

The government misplaces reliance on *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 375 (2000). That decision merely applied the Supremacy Clause to invalidate a "state Act's provisions [in] conflict with Congress's specific delegation to the President of flexible discretion." *Id.* at 388. There the presidential action concerned sanctions against a foreign country, not activity on domestic roads. *Id.* at 368-69. Congress has never delegated, implicitly or explicitly, authority to the President to open internal roads to tens of thousands of Mexican trucks in derogation of NEPA and CAA. *See Tag v. Rogers*, 267 F.2d 664 (D.C. 1959), *cert. denied*, 362 U.S. 957 (1960) ("Whatever force appellant's argument might have in a situation where there is no applicable treaty, statute, or constitutional provision, it has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law as superior to canons of international law.")

The government insists that the President himself is not subject to the APA even though its definition of "agency" includes "each authority of the Government of the United States" and excludes specific entities like Congress without excluding the President. 5 U.S.C. §§ 551(1), 701(b)(1). *See Franklin v. Massachusetts*, 505 U.S. 788 (1992). There this Court did hold that "textual silence" in the APA's definition of "agency" would not subject the President to the procedural requirements of the APA. *Id.* at 800.

But *Franklin* does not support the presidential action here. In *Franklin*, the President had a statutory duty to decide whether or not to send a census report to Congress. Massachusetts, facing a loss of a seat under the decennial census, sued the Secretary of Commerce and the President over the census. But the presidential action there was nothing like the presidential action here. In *Franklin*, Congress had delegated specific duties to the President, who then acted within that delegation without the need for further administrative action. Here, the President acted beyond his statutory authority and the implementation by the Department of Transportation has violated multiple federal statutes.

In essence, the government blithely seeks to ignore federal law under the pretext of allegedly "serious and ongoing harm to United States' businesses and consumers and to international relations with Mexico." Pet. at 26. And what is that supposed harm? In its Petition, the government argued that it will be more efficient simply to open the borders to trucks from Mexico, and that the court below protects inefficiency. "The Ninth Circuit's decision prevents the President's action from taking effect and thereby hampers commerce. On a border where there are approximately 4.5 million northbound truck crossings each year, cargo from Mexico must be transferred at the border onto U.S. trucks before it can be shipped to points in the United States beyond the border zone. Passengers using scheduled bus services must follow

similarly inefficient procedures." Pet. at 25-26 (citation omitted). But this inefficiency has sound justifications, and other applicable federal laws cannot be ignored in the name of efficiency.

The action by the Department of Transportation to expose our highways and byways to tens of thousands of trucks from Mexico is the impermissible result of a foreign adjudication rather than compliance with applicable federal law. The decision below properly held that the Department acted arbitrarily and capriciously in violating federal law.

II. NAFTA UNCONSTITUTIONALLY CREATES A FOREIGN COURT WITHOUT AUTHORIZATION BY TREATY.

The NAFTA tribunal, the court below, and most commentators repeatedly describe and interpret NAFTA as though it were an actual treaty. *See, e.g., Public Citizen*, 316 F.3d at 1009, 1011, 1913, 1017, 1018. This is error. "Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, **provided two-thirds of the senators present concur**." *Holden v. Joy*, 84 U.S. 211, 242-43 (1872) (emphasis added). This is, after all, what the U.S. Constitution expressly requires. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. Art. II, Sec. 2. There is no other constitutional authority for binding the United States to major international commitments. Nothing else can subject Americans to the rulings of international tribunals. Approved by a vote of only 61-38 in the Senate, NAFTA fell short of the requisite two-thirds majority for passage as a treaty. 139 Cong. Rec. S16,712-13 (daily ed. Nov. 20, 1993).

NAFTA, sweeping in scope, far surpasses most bona fide treaties in breadth and impact. The House Ways and Means Committee itself declared that NAFTA "is the most comprehensive trade agreement ever negotiated and creates the world's largest integrated market for goods and services." House Report No. 103-361(I), at 8 (1993). NAFTA is unique in American history in how it integrates the domestic economy with those of two other large nations. NAFTA has everything that one would expect in a treaty; most treaties duly ratified by the Senate pale in comparison. The House has no authority to pass such a treaty. 5 Annals of Cong. 760-62 (1796) (reprinting President Washington's message in which he denied any role by the House in determining whether to implement treaties that were properly approved by the President and then duly ratified by the Senate); *id.* at 771-72 (resolution adopted by the House disclaiming "any agency in making Treaties," while reserving some authority with respect to treaties that stipulate regulations on matters within enumerated congressional powers).

"If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998). *See also* Federalist No. 75, The Federalist Papers 419-20 (Rossiter & Kesler eds. 1999) ("The [treaty] power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. . . . However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration. . . . [T]he joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them."). Lacking approval as a treaty, the delegation by NAFTA of adjudicatory authority is particularly objectionable. It implicitly transfers power from the federal judges

confirmed by the Senate to foreign arbitrators appointed by foreign countries.

The creation by Congress, without treaty authorization, of an international tribunal to dictate who may travel on our roads is no more acceptable than shifting jurisdiction from Article III to Article I courts. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (invalidating an attempt by Congress to shift jurisdiction from Article III courts to Article I bankruptcy courts). Justice Brennan noted in his plurality opinion that "of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts . . . [and] the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges." 458 U.S. at 64 n.15. But transferring the same power to a new tribunal other than an Article III court would be constitutionally infirm:

> Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

Id. at 76.

The same constitutional prohibition applies with greater force to NAFTA's tribunals. As the *Marathon* decision made clear, Congress does not have the power to establish new courts to decide a new category of commercial disputes, nor can it endow such courts with the power to dictate entry by tens of thousands of trucks from a foreign country. It matters not, as the government argues, that "[t]his Court has recognized that '[t]he Constitution gives Congress broad, comprehensive' and 'plenary' powers to regulate foreign commerce." Pet. at 3 (quoting *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125-126 (1973)). The Constitution does not allow Congress to subject federal law to decisionmaking by international tribunals. This sort of dispute could only be handled by an Article III court rather than a tribunal outside of the judiciary, and presidential implementation of the foreign decision does not justify it.

Currently the executive branch enforces decisions by the judiciary. Does the Constitution authorize the executive branch to enforce decisions by extraterritorial tribunals? That is what NAFTA, through a congressional-executive agreement rather than Senate ratification, purports to accomplish. Unsatisfied with the American judiciary, Congress and the President could then apparently limit its jurisdiction and establish adherence to courts outside of the United States. If NAFTA's method of resolving disputes is affirmed without ratification by a treaty, nothing would prevent Congress and the President from moving judicial authority offshore. Implicitly transferring authority to an international tribunal in the Hague over disputes concerning a multinational corporation would become possible without even complying with the Treaty Clause.

"Few constitutional provisions seem so easily evaded" as the Treaty Clause. John C. Yoo, "Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements," 99 Mich. L. Rev. 757, 759 (2001). If NAFTA need not comply, one wonders why any controversial treaty need be submitted to the Senate for ratification again. "According to this logic, President Bush could now resubmit the Test-Ban Treaty to Congress for approval by majority vote, and President Wilson could have brought the United States into the League of Nations through a statute, even after the defeat of both agreements in the Senate." *Id. See also Made in the USA Foundation v. United States*, 242 F.3d 1300, 1311-17

(11th Cir.), *cert. denied*, 534 U.S. 1039 (2001) (reviewing, without deciding, whether NAFTA is constitutional despite bypassing the Treaty Clause); Laurence H. Tribe, "Taking Text and Structure Seriously; Reflections on Free-Form Method in Constitutional Interpretation," 108 Harv. L. Rev. 1221 (1995) (arguing, in the context of NAFTA, that the Constitution may require treaty ratification for major congressional-executive agreements).

The growing use of congressional-executive agreements as a bypass to the Treaty Clause threatens even federalism. Agreements with foreign powers have traditionally enjoyed greater latitude in infringing on state sovereignty, perhaps implicitly justified by the requisite 2/3rd approval requirement in the Senate. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."). Congressional-executive agreements, in contrast, lack the legitimacy of approval by a supermajority of the Senate. A simple majority in Congress should not enjoy treaty authority that would thereby enable it to erode state sovereignty. *Cf. New York v. United States*, 505 U.S. 144, 168 (1992) (invalidating a federal statute in part because it caused "the accountability of both state and federal officials [to be] diminished").

The U.S. Constitution does not allow treaties to be passed by simple majorities of Congress. Nor does it allow Congress to create a mechanism for the President to enforce a decision of an international tribunal.

III. THE REQUISITE ENVIRONMENTAL IMPACT STATEMENT MUST INCLUDE EFFECTS ON HUMAN SAFETY AND LIVES.

The requisite environmental impact statement (EIS) should thoroughly address the safety, pollution and even drug hazards posed by an influx of tens of thousands of Mexican

trucks on roads throughout the United States. The risks are substantial and NEPA requires an objective and realistic assessment of them. The Department of Transportation and its Federal Motor Carrier Safety Administration (FMCSA) failed in their obligations to evaluate completely these dangers.

The Department and FMCSA underestimated the threat to the safety of American citizens posed by a vast increase in trucks from Mexico on our roads. Tragic stories of needless deaths caused by a foreign driver who failed to understand or obey the rules of our roads are all too familiar. In 1994, Rev. Duane Willis and his wife Janet lost all six of their children in a fiery crash caused by a truck illegally driven by Ricardo Guzman. "Company that Hired Illegal Driver to Pay $10.7M," USA Today, June 19, 2001. Former Democratic Congressman Glenn Poshard later explained, "We found out that there were at least three people that tried to tell Guzman to get off the road only minutes before the crash, that the huge taillight assembly on the truck was about to fall off and cause a wreck. Several truck drivers even tried reaching Guzman by radio, but they said he couldn't speak English so he didn't understand a word they said." Jim Muir, "Glenn Poshard: On the Record: Speaking Frankly About the Corruption, Wrongdoing and Cover-Ups," The Southern Illinoisan, Mar. 1, 2003.

Texas legislator Ciro Rodriguez observed the following at the time of the NAFTA panel decision mandating access by Mexican trucks:

> Mexican trucks are held to less stringent safety standards than U.S. trucks. Unlike American drivers, Mexican drivers do not have to meet minimal medical quailfications, submit to drug testing, or maintain logbooks which monitor the length of time they spend behind the wheel. Additionally, Mexican trucks are older, heavier, and more likely to transport unmarked toxic or

> hazardous materials. Overall, Mexican trucks are reported to have three times as many safety deficiencies than U.S. trucks and without a standard regulatory apparatus in place, Mexico has been unable to improve the safety of its trucks or enforce a border safety inspection program of its own.

Ciro Rodriguez, "Safety on the NAFTA Superhighway," Congressional Press Releases, Feb. 17, 2001 (quoted in Paul Stephen Dempsey, "Free Trade But Not Free Transport? The Mexican Stand-Off," 30 Denv. J. Int'l L. & Pol'y 91, 96 (Winter 2001)). Mexican truck drivers are also not covered by the minimum wage laws, creating an incentive for employers to overutilize the Mexican drivers. Dempsey, 30 Denv. J. Int'l L. & Pol'y at 95.

Particularly frequent are road accidents by vans or trucks filled with illegal aliens, driven by "coyotes" who are paid handsomely to transport them into the United States. As reported by the Denver Post, "[s]mugglers stuff cars, vans and trucks with Latin Americans willing to pay up to $10,000 to be transported illegally into the U.S. Several times a year, the outcome is similar to Tuesday's crash that killed five people on Interstate 76." Kirk Mitchell, "Police: Deadly I-76 Crash Fits Immigrant-Smuggling Profile," Denver Post, Jan. 29, 2004. The van in that crash was carrying eleven people from Guatemala; one of the fatalities was a pregnant woman who was rushed to the hospital in order to save and deliver her unborn child. "Tuesday's early-morning crash of her sport utility vehicle, packed dangerously full with Guatemalan families on a long-distance trip, was all too familiar for investigators." *Id.*

Road accidents pose a greater safety hazard than any other environmental issue. In 2002, 30.7 million drivers were involved in motor vehicle accidents in the United States. *See* World Almanac 79 (2004) (citing the National Safety Council). Far more people die in car accidents than from

terrorism, for example. *Id.* (noting that 44,000 people died in 2002 in car accidents). Truck accidents now kill more than 5,000 people annually in the United States. Sixty federal officers inspected Mexican trucks along the border in fiscal year 2000 and found that safety violations required taking 36% out of commission; fifty-three Texas officials did inspections in calendar year 2000 and safety violations required taking 37% out of service. James Pinkerton, "Semi-Conscious State; Inspection of Trucks on Border Threadbare," Houston Chronicle, Aug. 12, 2001, A1. Opening the border would flood our highways with unsafe trucks, creating a hazard for all American drivers. The ability to communicate in English and understand the flow of traffic is crucial to avoiding accidents, ascertaining afterwards what happened, and planning how they can be prevented in the future.

Pollution from the Mexican trucks should also be addressed by an EIS. The court below observed "a wealth of government and private studies showing that diesel exhaust and its components constitute a major threat to the health of children, contribute to respiratory illnesses such as asthma and bronchitis, and are likely carcinogenic." *Public Citizen*, 316 F.3d at 1024. The court properly found that the Department of Transportation was remiss in failing to prepare an environmental impact statement "to consider whether any negative health effects could be associated with increased diesel exhaust emissions." *Id.* (citing *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 353 (S.D.N.Y. 1991) (holding that "even [the] marginal degradation of drinking water" has been considered enough to trigger the need for an environmental impact statement)).

There is no "interference" with "presidential discretion," as the government now argues, in requiring the Department of Transportation to obey the law. Pet. at 24. The Department lacks treaty authorization to override domestic law. Its failure

to prepare an EIS was arbitrary and capricious. Like a spraying program, the introduction of numerous pollution-emitting vehicles from Mexico poses a direct threat to the well-being of American citizens, and this threat must be thoroughly analyzed and vetted. *See, e.g., Oregon Environmental Council v Kunzman*, 714 F.2d 901, 904 (9th Cir. 1983) (EIS must address the effects of the pollutant on children and others, and must analyze carcinogenic effects).

Allowing tens of thousands of Mexican trucks onto our highways is surely as threatening to our environment as highway construction itself, and both require preparation of an EIS. "The health and safety of the residents of this neighborhood will be significantly affected by the introduction of a highway through their community," and therefore required preparation of an EIS. *Highland Cooperative v. City of Lansing*, 492 F. Supp. 1372, 1380 (W.D. Mich. 1980). That court enjoined the city "from acquiring the rights-of-way, awarding construction contracts, commencing construction, or in any other way proceeding with the Edgewood Project pending the preparation and issuance of an Environmental Impact Statement." *Id.* at 1383. Far more compelling is the case for an EIS here, with the attempted opening of all highways to numerous old trucks from a foreign country.

The EIS should also address the inevitable increase in illicit drugs coming into the United States in Mexican trucks. U.S. Attorney Frank Whitney admitted that, even without the influx of endless numbers of Mexican trucks, "It's virtually impossible for the border patrol or customs to truly check every one of these vehicles." Craig Jarvis, "N.C. Seen as Hub where Illicit Drugs Repackaged," The News & Observer (Raleigh, N.C.), Jan. 22, 2004, A1. The Department of Transportation's Office of Inspector General (OIG) "found that the number of trucks crossing the U.S.-Mexico border increased from 2.5 million in 1993 (the year NAFTA was

passed) to 3.7 million in 1997. Out of the millions of trucks, only about one percent of trucks are inspected." J. Patrick LaRue, "The 'ILL-ICIT' Effects of NAFTA: Increased Drug Trafficking into the United States Through the Southwest Border," 9 Currents Int'l Trade L.J. 38, 40 (Summer 2000) (citations omitted). Mexico is an "important supplier of marijuana and heroin to the United States and emerged as a point of transit for the cocaine coming from South America." Jorge Chabat, "Mexico's War on Drugs: No Margin for Maneuver," 582 The Annals of The American Academy of Political and Social Science 134, 136 (July 2002).

NAFTA has already increased illegal drug trafficking so much in border states that the Texas Attorney General described it as the "North American Free *Trafficking* Agreement." *Major Drug Traffickers*, U.S. DEP'T OF JUSTICE, DEA BRIEFING BOOK (Oct. 1999) (emphasis added).[3] "NAFTA has undoubtedly 'opened' the floodgates for Mexican drug traffickers by not only increasing trucking and railway traffic, but by crippling the Southwest border's economic development." LaRue, 9 Currents Int'l Trade L.J. at 45. The hazard to be caused by opening our borders further would be catastrophic. One commentator observed:

> Recent intelligence reports indicate that Mexican traffickers . . . have focused on three major means of transport into the U.S.: truck cargo, railway and illegal or migrant workers known as 'mules'. For example, one truck that was stopped near San Diego carried eight tons of cocaine in cans of jalapeno peppers. Law enforcement officials believe that the cocaine belonged to a businessman who owns one of the biggest trucking companies in Mexico. . . . In May 1997 a tractor-trailer

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[3] http://www.usdoj.gov/dea/briefing-book/page34-48.htm (visited Nov. 20, 1999).

> load of commercial size cans of Del Monte tomatoes were opened by the DEA in New York City revealing sealed bundles of cash in the tomato sauce.

Id. at 40-41. The more trucks that enter the country from Mexico, the greater the potential for drug smuggling.

Another commentator echoed identical concerns:

> Drug traffickers smuggle record levels of narcotics into the U.S. via the U.S.-Mexico border, and are presenting a growing risk to the security of the U.S. Mexico is a major source of heroin, marijuana, and cocaine trafficking to the U.S. Three of the four primary points of cocaine importation are located along the Mexico border in Texas, Arizona, and California. Marijuana trafficking through Mexico accounts for the majority of marijuana smuggled into the U.S. This high volume of narcotics trafficking has established Mexican traffickers as "the world's preeminent drug traffickers."

Jason C. Messenger, "Opening the U.S.-Mexico Border: Problems and Concerns for the Bush Administration, the Countries, and the Legal System to Consider," 9 Tulsa J. Comp. & Int'l L. 607, 617 (Spring 2002) (citations omitted). He concluded that "[t]he essential role of commercial traffic and the U.S.-Mexico border is obvious since rather large amounts of these illegal drugs are carried on tractor-trailers and are reused to carry the funds from the sales in the U.S." *Id.* at 617-18 (citations omitted).

Increased importation of drugs has a devastating effect on the human environment, and should be addressed in the requisite EIS. This is not merely a psychological harm as alleged and rejected in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Increased levels and usage of narcotics inflict serious and often fatal harm to innocent human beings. Regardless of whether the increased drug trafficking would itself trigger the need for an EIS, the

compilation of an EIS required for independent reasons should not ignore the devastating effect of drugs in its analysis.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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United States Department of Transportation,
Petitioner,

v.

Public Citizen, *et al.*
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE DEFENDERS OF WILDLIFE, ENVIRONMENTAL DEFENSE, AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTERESTS OF AMICI CURIAE[1]

Defenders of Wildlife is a nonprofit organization dedicated to the protection of native animals and plants in their natural communities. It focuses its actions on curtailing two of the most serious environmental threats to the planet: the accelerating rate of extinction of species, and habitat alteration and destruction. Defenders of Wildlife has thousands of members who live in and enjoy recreating in the border region of the United States.

Defenders of Wildlife also regularly relies on the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 706(1), (2), and the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, as well as the Council on Environmental Quality's binding regulations, 40 C.F.R. 1500-1508, in bringing cases in federal court to ensure compliance with laws enacted to protect the environment.

Environmental Defense (formerly the Environmental Defense Fund) is a national nonpartisan, nonprofit organization representing more than 400,000 members nationwide. Since 1967 Environmental Defense has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici* state that none of the parties or their counsel wrote the brief in whole or in part. In addition to *amici*, their members, and counsel, counsel for *amici* were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic and the Stanford Law School Environmental Law Clinic: William B. Adams, Brigham John Bowen, Eric J. Feigin, and Jennifer J. Thomas; clinic members David M. Cooper, Daniel S. Goldman, and Nicola J. Mrazek also participated. The Stanford Law School Supreme Court Litigation Clinic has covered the costs connected with the brief.

problems. Environmental Defense has helped design such landmark clean air programs as the market-based pollution cap and allowance trading program adopted in the 1990 Clean Air Act amendments to abate acid deposition. Consistent with its belief that economic prosperity and markets can be harnessed to protect public health and the environment, Environmental Defense supports the North American Free Trade Agreement and advocates associated public health and environmental protections. The case before this Court presents issues integrally related to Environmental Defense's core mission: protecting public health and the environment from harmful airborne contaminants.

Environmental Defense has appeared in this Court as amicus or party in many cases involving federal environmental statutes, including *Alaska v. EPA*, 124 S. Ct. 983 (2004); *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994); and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

The Sierra Club is a national nonprofit organization of approximately 750,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass air pollution and public health. The Club's particular interest in this case and the issues that the case concerns stems from the threat it poses to informed agency decisionmaking.

SUMMARY OF ARGUMENT

The question posed by this case is whether the Federal Motor Carrier Safety Administration (FMCSA) can evade its

responsibility under this nation's environmental laws to consider the impact that increased foreign truck traffic will have on the environment. The government concedes, as it must, that the FMCSA is a federal agency subject to both the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, and that it must assess the environmental impacts of its safety regulations. The statutes, regulations, and consistent precedents of this Court and the courts of appeals show that those impacts include the effects on the environment, both locally and nationally, that will flow over time from a foreseeable change in the mix of trucks on the road, as older, more polluting Mexico-domiciled trucks are substituted for a domestic fleet that is becoming progressively cleaner due to Environmental Protection Agency rules governing new truck engines.

The FMCSA failed sufficiently to assess these impacts. It declined to prepare the thorough Environmental Impact Statement that NEPA requires because a deeply flawed, more preliminary analysis – an Environmental Assessment (EA) – led it mistakenly to conclude that its rules would not "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C). Of the EA's many errors, the following three are particularly significant. First, the FMCSA concluded that it was not required to take into account the increased emissions produced by the Mexico-domiciled trucks because the only actual "effect" of its regulations would be the pollution caused by foreign trucks idling by the side of the road during individual safety inspections. Second, the EA's geographical frame of reference was insufficient: The FMCSA looked at the incremental effect of Mexico-domiciled trucks on the national level of pollutant emissions rather than evaluating, as NEPA requires, the trucks' impact on air quality in the areas where they are likely to be concentrated and where emissions are likely to occur. Third, its temporal frame of reference was too short: The FMCSA limited its analysis to a single year, now passed, and failed

entirely to analyze the long-term environmental effects of substituting Mexican for domestic carriers, even though the activity allowed by the FMCSA regulations can continue in perpetuity.

The FMCSA's separate refusal to perform a conformity review under the CAA was similarly flawed. That Act requires states to comply with national air quality standards. 42 U.S.C. 7410(a). To make sure that federal action will not interfere with a state's efforts to do so, the CAA forbids federal agencies from licensing, permitting, or approving any activity that does not conform to a state's implementation plan. *Id.* § 7506(c)(1).

The Environmental Protection Agency (EPA) has promulgated regulations governing federal agencies' duties with respect to conformity review. Under these regulations, an agency must ask whether the direct and indirect air quality effects of regulated pollutant emissions "caused by the Federal action" will equal or exceed regional threshold levels established by the EPA. 40 C.F.R. 93.152. Emissions from Mexico-domiciled trucks permitted by the FMCSA to travel beyond the border zone are "caused by" the FMCSA, because the emissions would not occur without agency-issued permits. *Id.* But the agency's reliance on its flawed Environmental Assessment led it to conclude that its actions would not create sufficient air quality effects to trigger conformity review. If the FMCSA had conducted proper NEPA and CAA conformity reviews, and if Mexico-domiciled trucks met emission standards comparable to U.S. standards, there would be no dispute in this case.

The agency's conclusion that the effects of its action were insignificant violates not simply the law and the regulations: It runs afoul of simple common sense. This Court should therefore affirm the judgment of the Ninth Circuit and require the FMCSA to comply fully with the requirements of NEPA and the CAA.

ARGUMENT

I. NEPA IS THE NATION'S BEDROCK ENVIRONMENTAL LAW AND APPLIES TO ALL MAJOR FEDERAL AGENCY ACTIONS

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, is "our basic national charter for protection of the environment." 40 C.F.R. 1500.1(a); *see also* Daniel R. Mandelker, *NEPA Law and Litigation* § 1.1 (July 2003) (referring to NEPA as "an environmental Magna Carta"). NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" addressing "the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. 4332. It further requires that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth" therein. *Id.*

In enacting NEPA, Congress has demonstrated "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). NEPA mandates that environmental issues occupy the forefront of agency decisionmaking to ensure the development of "new means and procedures to preserve environmental values in the larger public interest, to coordinate Government activities that shape our future environment, and to provide guidance and incentives for State and local government and for private enterprise . . . ." S. Rep. No. 91-296, at 5 (1969). NEPA has "reorder[ed] national goals and priorities" so that our nation no longer exclusively emphasizes "the production of goods" or the "increase [of] gross national product." *Id.*

A. Congress Intended NEPA to Play a Central Role in Governmental Decisionmaking

Congress' purpose in enacting NEPA was not simply to state a precatory environmental policy, nor is NEPA an empty shell that federal agencies may circumvent or ignore at will. Far from merely announcing abstract principles, Congress "[made] environmental protection a part of the mandate of *every* federal agency and department." *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1112 (CADC 1971) (emphasis added). NEPA therefore requires federal agencies to take a "hard look at [the] environmental consequences" of their proposed actions. *Methow Valley*, 490 U.S. at 350 (quotation marks omitted). In so doing, NEPA makes certain "that environmental concerns will be integrated into the very process of agency decision-making." *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

This integration serves two primary purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Methow Valley*, 490 U.S. at 349. As the implementing regulations make clear, NEPA "is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. 1500.1(c). According to the principal Senate sponsor, NEPA creates a scheme that "administrators may refer to . . . for guidance in making decisions . . . [where] environmental values [are] in conflict with other values." 115 Cong. Rec. 19,009 (1969) (statement of Sen. Jackson).

Second, NEPA "guarantees that the relevant [environmental] information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Methow Valley*, 490 U.S. at 349. As Congress

noted, NEPA ensures that federal agencies provide sufficient environmental information about the proposed action for "subsequent reviewers, both within the executive branch and in Congress, to consider." S. Rep. No. 91-296, at 21. By thoroughly collecting and analyzing this data, federal agencies educate not only themselves, but also other governmental actors and the public, about the environmental ramifications of their proposed action.

Contrary to the United States' intimations, *see* U.S. Br. 38 & n.16, 40, the ratification of the North American Free Trade Agreement (NAFTA), 32 I.L.M. 289 (1993), leaves untouched the environmental obligations that Congress created in NEPA. One of NAFTA's express purposes was to "STRENGTHEN the development and enforcement of environmental laws and regulations." NAFTA pmbl., 32 I.L.M. 289, 297 (1993). The Agreement specifically recognizes the power of the United States to "adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers." NAFTA art. 904(1), 32 I.L.M. at 387. Moreover, the North American Agreement on Environmental Cooperation, NAFTA's environmental side agreement, proclaims that one of its objectives is to "enhance compliance with, and enforcement of, environmental laws and regulations." NAAEC pmbl., 32 I.L.M. 1480, 1483 (1993). And by its plain terms, NAFTA's implementing statute sustains and protects the integrity of federal environmental laws: "Nothing in this Act shall be construed to amend or modify any law of the United States, including any law regarding . . . the protection of the environment." 19 U.S.C 3312(a)(2). These statements demonstrate that NEPA continues to apply even where a proposed agency action relates to the United States' obligations under NAFTA.

B. NEPA's Objectives are Achieved Through Full Consideration and Disclosure of the Environmental Impacts of Federal Agency Action

When it enacted NEPA, Congress also established the Council on Environmental Quality (CEQ), an executive body responsible for reviewing "the various programs and activities of the Federal Government in light of the policy set forth in [NEPA]." *Andrus*, 442 U.S. at 358 (citing 42 U.S.C. 4344(3)). The CEQ has issued regulations specifying agencies' obligations under NEPA, *see* 40 C.F.R. 1500-1508, and this Court has concluded that these regulations merit "substantial deference." *Andrus*, 442 U.S. at 358.

The CEQ regulations have clarified that NEPA applies to all actions that "are potentially subject to Federal control and responsibility." 40 C.F.R. 1508.18. Such actions include an agency's adoption of regulations. *Id.* § 1508.18(b)(1).

NEPA "supplement[s]" an agency's existing authority by requiring it to consider environmental implications even when its general policymaking authority is more limited. 40 C.F.R. 1500.6; *see also* 42 U.S.C. 4335; *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 835 (CA6 1981) ("NEPA supplements the existing goals of agencies and provides that agencies should also consider environmental concerns."). Unless a federal agency immediately determines that a full Environmental Impact Statement (EIS) will be necessary, 40 C.F.R. 1501.3(a), NEPA compliance begins with the preparation of an Environmental Assessment (EA) – a document meant to provide "sufficient evidence and analysis for determining whether to prepare an [EIS]." *Id.* § 1508.9(a). The regulations dictate that an EA must include a full and fair discussion "of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Id.* § 1508.9(b). Under certain carefully defined circumstances, the EA may lead to a

Finding of No Significant Impact (FONSI) rather than a full EIS. *See id.* § 1508.13.

A federal agency must prepare an EIS when an EA indicates that a proposed action may "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C). This critical document must contain a detailed discussion of the "effects" of the agency's action. These include both "direct effects" that are "caused by the action and occur at the same time and place" and also "indirect effects" that are "later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8(a), (b). The definition of "effects" also includes "cumulative effects," *id.* § 1508.25(c), which the regulations define as the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions*." *Id.* § 1508.7 (emphasis added). In addition, the analysis must consider impacts on human health. *Id.* § 1508.8. In evaluating the significance of an action, agencies must analyze local, as well as national, impacts and must also consider "both short- and long-term effects." *Id.* § 1508.27. Further, the EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the agency's proposed action. *Id.* § 1502.14(a). This discussion must address "appropriate mitigation measures" that the agency could take to reduce the adverse environmental effects of its proposed action. *Id.* § 1502.14(f).

When a federal agency prepares an EIS, it does not do so simply for its own benefit. Intergovernmental cooperation is essential to allow "other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Thus, the CEQ regulations require federal agencies to circulate the EIS to "[a]ny Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce

environmental standards." 40 C.F.R. 1502.19(a). Indeed, one of the main functions of the EIS preparation process is to solicit input from these expert agencies and to modify the environmental analysis accordingly. *Id.* Part 1503; *see also Methow Valley*, 490 U.S. at 350 ("[W]here the adverse effects on air quality . . . will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner."). In addition, the CEQ regulations contemplate that an EIS prepared by one agency for a particular decision also may be relied upon and used by other federal, state and local agencies with jurisdiction over one of the environmental impacts covered by the document. 40 C.F.R. 1506.3, 1508.5.

II. NEPA REQUIRED THE FMCSA TO PREPARE AN EIS CONSIDERING THE ENVIRONMENTAL EFFECTS ATTRIBUTABLE TO PERMITTING INCREASED MEXICAN CARRIER TRAFFIC BEYOND THE BORDER ZONE

NEPA expressly applies to "*all* agencies of the Federal Government," 42 U.S.C. 4332(2) (emphasis added). The government therefore concedes that the FMCSA "must apply NEPA." U.S. Br. 38 n.16. But the government seeks to sidestep the statute's requirements by offering an exceptionally cramped view of the obligations NEPA imposes. *See* U.S. Br. 24-42. Its position incorrectly interprets NEPA, its implementing regulations, and the prior decisions of this Court. All of these authorities indicate that the FMCSA was required to prepare an EIS assessing the environmental impacts of Mexican carrier operations beyond the border zone.

A. The FMCSA's EA Provided No Basis on Which to Issue a FONSI

The FMCSA's issuance of a FONSI in this case was "not in accordance with law." *Marsh*, 490 U.S. at 375 n.21 (quoting 5 U.S.C. 706(2)(A)). In all cases where an agency action falls under NEPA, an agency that does not opt simply to undertake an EIS at the outset must prepare an EA that "[b]riefly provide[s] *sufficient evidence and analysis* for determining whether to prepare an [EIS] or a [FONSI]," 40 C.F.R. 1508.9(a)(1) (emphasis added). In order for a FONSI to be justified in place of an EIS, the EA must show that the agency's action "will not have a significant effect on the human environment." *Id.* § 1508.13.

The EA prepared by the FMCSA in this case fails to provide "sufficient evidence and analysis" to support such a conclusion. In preparing its EA, the FMCSA simply ignored the CEQ's definitions of "significant" and "effect." A proper understanding of these terms demonstrates why the FMCSA's EA was entirely insufficient to support a FONSI.

1. An Increase in Mexico-Domiciled Truck Emissions Outside the Border Zone Is One Effect of the FMCSA's Actions

Because it is a "cumulative impact" of the FMCSA's promulgation of new safety rules, the travel of Mexico-domiciled trucks outside the border zone required environmental analysis.[2] The CEQ regulations define

[2] The trucks' movement also requires NEPA analysis as either a "direct" or "indirect" effect of the FMCSA's actions. 40 C.F.R. 1508.8. The trucks' operations are directly "caused by" the agency's issuance of operating authority. *Id.* § 1508.8(a) (defining direct effects); *see also infra* at II.B. The movement of the trucks is also a "reasonably foreseeable" result of the agency's promulgation of safety regulations. 40 C.F.R. 1508.8(b) (defining indirect effects); *see also infra* at 12.

"effects" under NEPA to include those "impacts" of an agency action that are "cumulative" in nature. 40 C.F.R. 1508.8. A "cumulative impact" is any "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

At the time the FMCSA prepared its EA in 2002, there was no Mexican carrier traffic beyond the border zone for two reasons. First, there was a trade moratorium on the "entry of motor carriers domiciled in a contiguous foreign country." Pet. App. 9a (quotation marks omitted). Second, the FMCSA could not process Mexican carriers' applications for permission to operate beyond the border zone because in December 2001 Congress forbade the FMCSA from spending any funds to process these applications until the FMCSA first promulgated new safety rules. Pub. L. No. 107-87, § 350, 115 Stat. 864 ("Section 350"). Though the moratorium was subsequently lifted in November 2002, U.S. Br. 2, Section 350 remains in effect. *See* Pub. L. No. 108-199, Div. F, Tit. I, § 130 (2004) (available on Westlaw at 2004 HR 2673).

The government concedes that the imminent lifting of the moratorium was "foreseeable" at the time the EA was prepared in January 2002. U.S. Br. 41. Anticipating this event, Mexican carriers began to submit applications to operate outside the border zone. *See* http://www.dot.gov/affairs/dot10702.htm (last visited Mar. 9, 2004). It was thus eminently foreseeable that if the FMCSA were to promulgate new safety regulations, some of the applications would be granted and Mexico-domiciled trucks would travel beyond the border zone. This foreseeable effect of the agency's actions required NEPA analysis. 40 C.F.R. 1508.7, .8.

2. The EA Failed to Analyze Whether Mexican Carrier Emissions Outside the Border Zone Will Have a "Significant" Impact on the Environment

The cursory and incomplete analysis contained within its EA did not support the FMCSA's determination that emissions from newly licensed Mexico-domiciled trucks would have "no significant effect on the human environment." J.A. 34. *Cf.* 40 C.F.R. 1508.13. The CEQ regulations mandate that "the significance of an action must be analyzed in *several contexts such as* society as a whole (human, national), *the affected region*, the affected interests, *and the locality*." 40 C.F.R. 1508.27(a) (emphases added). Moreover, when analyzing significance, "*both short- and long-term effects are relevant.*" *Id.* (emphasis added). The EA here failed to meet either requirement.

First, rather than analyzing the significance of increased Mexico-domiciled truck emissions in "several contexts," the EA analyzed them solely in one context: national. The EA merely stated, without more, that "[t]he changes in resulting emissions are negligible when compared to *national* levels of emissions for the operations of [commercial motor vehicles], all on-road sources, and total emissions from all sources." J.A. 167 (emphasis added). Omitted from the EA was any discussion of the impact upon the "affected region": the specific "localit[ies]" of the United States through which the Mexico-domiciled trucks will actually travel. 40 C.F.R. 1508.27(a). Obviously, many more Mexico-domiciled trucks will pass through Southern California than will enter Maine; consequently, Mexico-domiciled truck emissions will constitute a much higher percentage of emissions in Southern California than of emissions across the entire United States. Yet the FMCSA never bothered even to ask how the emissions would particularly impact specific areas.

Second, the EA neglected to analyze any "long-term effects" of the Mexican carrier emissions, instead focusing

solely on trucks "projected to operate in [Fiscal Year] 2002." J.A. 215-17, tbls. C-7 – C-9; *see also* J.A. 147 (stating that the data for the EA's air quality analysis appears in Appendix C). The new safety regulations were scheduled to take effect in May 2002. 67 Fed. Reg. 12,702 (Mar. 19, 2002). Since FY2002 ended on September 30, the EA considered only five months worth of emissions.

While it would be difficult under any circumstances to consider a five-month emissions analysis to be "long-term," that time frame was particularly inappropriate here. Not only did the EA fail to justify why future years would follow the same pattern as Fiscal Year 2002, but there was ample reason to believe that Fiscal Year 2002 was unrepresentative. First, *total* cross-border traffic will likely increase in the future due to an expansion in trade. While the EA admits that "the total amount of cargo transported from Mexico into the United States could increase *slightly*," J.A. 148 (emphasis added), it utterly neglects to justify *why* this effect would be so "slight" if it were properly considered over the course of several years. Second, the *relative* impact of Mexican carrier emissions compared to other emissions will likely also increase over time. Mexico-domiciled trucks, unlike their counterparts in the United States, are outside the jurisdiction of EPA engine emissions standards. By statutory mandate, these emissions standards can only grow stricter over time, *see* 42 U.S.C. 7521(b)(1)(C), and the EPA has promulgated new rules that will apply to engines beginning with model years 2004 and 2007. *See* 40 C.F.R. 86.004-11, 86.007-11. As a result, emissions from compliant domestic trucks will decrease, and emissions from noncompliant Mexico-domiciled trucks will constitute a progressively higher percentage of the overall pollution burden. The narrow, short-term time frame taken by the EA utterly ignores this critical difference in the current and future fleet mix for each nation.

B. The Government's Argument Rests on an Unsupportable Notion of Causation

Despite the fact that Section 350 prevents the authorization of Mexican carriers to operate beyond the border zone until the FMCSA issues new safety regulations, the government nevertheless contends that the moratorium modification is the sole cause for Mexico-domiciled trucks traveling beyond the border zone. U.S. Br. 30-42. Under the government's erroneous conception of causation, "the only increased emissions resulting from the [FMCSA] regulations" would be emissions caused by roadside safety inspections undertaken while processing Mexican carriers' applications. U.S. Br. 41. This argument misrepresents both NEPA and the law of causation.

1. The FMCSA's Actions Are a Legal Cause of Mexican Carriers Operating Outside the Border Zone

In asserting that the FMCSA is responsible for only inspection-related emissions, the government's argument ignores the NEPA causation framework that this Court articulated in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). *Metropolitan Edison* supplies a two-part analysis for the question of when NEPA requires "consideration of a particular effect." *Id.* at 773. It first asks what "change in the physical environment" is caused by the agency action in question. *Id.* It then requires the agency to assess the environmental impact of any effect with "a reasonably close causal relationship" to that change. *Id.* at 774.

In *Metropolitan Edison*, the Nuclear Regulatory Commission (NRC) caused a change in the physical environment by granting permission for the renewed operation of a nuclear power plant. 460 U.S. at 775. The Court therefore held that it was proper under NEPA for the

NRC to consider the following "direct effects" of granting that permission: increased radiation, fog, water discharge, and risk of a nuclear accident. *Id.* This Court has taken an identical approach to causation in other NEPA cases. *See, e.g., Marsh*, 490 U.S. at 363-65, 385 (finding that a change in the physical environment in constructing a dam would require an additional EIS if new and accurate information were available regarding impact upon fish population and soil quality); *Methow Valley*, 490 U.S. at 337-39, 350 (finding that a change in the physical environment by permitting development of ski resort required an EIS studying, *inter alia*, effects on regional air quality).

Like the regulatory actions in those cases, the promulgation of regulations that allow Mexico-domiciled trucks to operate beyond the border zone will cause a change in the physical environment: In this case, that effect will be increased foreign vehicle traffic. *Metropolitan Edison* thus requires the FMCSA to consider environmental effects with a "reasonably close causal relationship" to that change. 460 U.S. at 774. In the case of the Mexico-domiciled trucks, these effects of course include the emissions they create and the concomitant impact upon regional air quality.

In asserting that the FMCSA is responsible for only inspection-related emissions, the government draws an artificial line between the *process* of granting permission (the inspections) and the *result* that follows from granting that permission (the movement of the trucks). That reasoning ignores the fact that *Metropolitan Edison* itself involved an agency's grant of permission. This Court deemed Metropolitan Edison's restarting of the power plant to be a "change in the physical environment" caused by the NRC's grant of permission to do so. *Metropolitan Edison*, 460 U.S. at 773-75; *see also Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 106-107 (1983) (indicating that consideration of "significant health, socioeconomic, and cumulative consequences" of a power plant is appropriate when the NRC licenses its operation).

The CEQ regulations specifically mention "[a]pproval of specific projects" such as "by permit or other regulatory decision" in their definition of "major federal actions" subject to NEPA analysis. 40 C.F.R. 1508.18. As this Court has recognized in its prior cases, analyzing an action of this type would be meaningless unless there is consideration of what will happen after an agency grants permission for the private party's action.[3]

2. The Order Lifting the Moratorium Did Not Excuse the FMCSA from Its Obligations Under NEPA

The existence of the order lifting the moratorium in no way undermines the causal link between the FMCSA's regulations and the movement of the trucks. The FMCSA conceded as much when it admitted that, standing alone, a moratorium modification can have "no practical effect," since Section 350 prevents the FMCSA from processing any applications from Mexican carriers unless and until it promulgates new safety regulations. J.A. 58.

The government's argument obscures this fact by implying that the FMCSA's rulemaking is simply a

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[3] Agencies routinely prepare an EIS when promulgating rules that regulate private parties, even though in such cases the private parties will provide the final link in a causal change affecting the environment. For example, the Federal Railroad Administration recently prepared an EIS for an interim final rule requiring private railroad companies to sound locomotive horns when a train approaches and enters a public highway-rail crossing. 68 Fed. Reg. 70,586, 70,662 (Dec. 18, 2003). Similarly, the Bureau of Land Management published notice of its intent to prepare an EIS to address the environmental effects of proposed amendments to regulations governing the issuance of grazing permits to private parties. 68 Fed. Reg. 10,030 (March 3, 2003). By the same token, the Nuclear Regulatory Commission recently indicated that it plans to prepare an EIS to assess the impact of new rules governing the disposition of solid materials that originate in private NRC-licensed facilities. 68 Fed. Reg. 9,595, 9,601-02 (Feb. 28, 2003).

component of the President's order. *See* U.S. Br. 31, 36. This contention ignores a crucial distinction: The regulations were promulgated pursuant to a *congressional* limitation on the agency's power to authorize Mexican carriers to serve points beyond the border zone, not pursuant to any presidential directive related to the moratorium. In fulfilling the congressional precondition established in Section 350, the FMCSA exercises independent control over the operation of Mexican carriers beyond the border zone. Not only must the FMCSA's regulations exist before a single truck is allowed to operate outside the border zone, but each and every truck that receives such permission must comply with those regulations.

It would subvert congressional intent to provide the FMCSA with an exemption from NEPA on the basis of a presidential order issued with regard to the United States' obligations under NAFTA. Congress has made clear that no such exemption is warranted. In NAFTA's implementing statute, Congress squarely stated that "[n]othing in this Act [implementing NAFTA] shall be construed to amend or modify any law of the United States, including any law regarding . . . the protection of the environment." 19 U.S.C. 3312(a)(2)(A). Congress was thus explicit that NAFTA does not in any way abrogate NEPA. Moreover, by enacting Section 350, Congress established an independent and integral role for the FMCSA in the NAFTA-compliant measure of licensing of Mexico-domiciled trucks to operate outside the border zone. By making this activity subject to agency action, Congress brought it squarely within the ambit of NEPA.

III. REQUIRING THE FMCSA TO PREPARE AN EIS SERVES THE IMPORTANT PURPOSES UNDERLYING NEPA

Requiring the FMCSA to prepare an EIS in this case would serve the critical purposes of NEPA. First, an EIS enables better rulemaking by the FMCSA itself with respect

to the operation of Mexico-domiciled trucks beyond the border zone. *See Methow Valley*, 490 U.S. at 349 (explaining that one purpose of NEPA is to provide information to an agency's decisionmakers about the environmental ramifications of their proposed actions). Second, the EIS educates both other governmental actors and the public by providing them with environmental information about the proposed action. *See id.* Here, the preparation of an EIS that evaluates and discloses the direct, indirect and cumulative environmental effects of regulations permitting Mexico-domiciled trucks beyond the border zone is critical to informed decisionmaking and to an informed public.

A. The EIS Would Enable the FMCSA to Choose Among Alternative Safety Regulations

The FMCSA could use the comprehensive environmental information contained in an EIS to craft specific safety regulations that have the secondary effect of reducing the environmental impact, including adverse health effects, from Mexican carriers. Thus, it is illogical for the government to claim that an EIS would serve "no purpose" in this case. U.S. Br. 38. By undergoing proper NEPA review, the FMCSA would ensure that, "in reaching its decision, [it] will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Methow Valley*, 490 U.S. at 349. Without such analysis, the agency cannot guarantee "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Id.*

1. The FMCSA's Mandate Incorporates Environmental Issues

The government's claim that the FMCSA need not prepare an EIS because the agency's mandate is limited to safety issues, *see* U.S. Br. 25-27, 32-33, 35-36, is unsound.

This characterization is legally untenable because NEPA provides *all* federal agencies with the supplemental authority to consider the environmental effects of their decisionmaking. *See* 42 U.S.C. 4335.

Moreover, the government's claim is factually erroneous because the FMCSA does exercise authority over multiple areas relating to the environment. For example, the FMCSA bears primary responsibility for enforcing regulations relating to the transportation of hazardous materials throughout the United States. *See* 49 U.S.C. 113(f) (delegating the FMSCA authority over 49 U.S.C. 5101 *et seq.* and 49 U.S.C. 3100 *et seq.*); 49 C.F.R. 386 (describing administrative enforcement proceedings for, *inter alia*, violations of regulations governing the transportation of hazardous materials found in 49 C.F.R. 171-80). Surely, the FMCSA must consider environmental issues when enforcing rules relating to the transportation and storage of highly toxic materials, as spills can harm both human life and the ecosystem. In fact, the agency's statutory mandate requires that it establish "minimum levels of financial responsibility" for motor vehicles to cover "public liability, property damage, and *environmental* restoration" during the interstate transportation of hazardous materials. 49 U.S.C. 31139(c)(1) (emphasis added). And the FMCSA's regulations permit it to seek an injunction in federal court to prevent the transportation of hazardous materials where the situation "presents a substantial likelihood that . . . substantial endangerment to health, property, or the *environment* may occur before" a formal administrative proceeding can commence. 49 C.F.R. 386.72 (emphasis added).

Similarly, to ensure commercial motor vehicle safety, the FMCSA regulates vehicle exhaust, *see* 49 C.F.R. 393.83, which can harm the operator, public health, and the environment. Additionally, the FMSCA has statutory authority to assist in developing a national intermodal transportation system that, among other things, is "economically efficient and *environmentally* sound." 49

U.S.C. 5501(a) (emphasis added). Since aspects of the FMCSA's mandate have an environmental focus, the agency's mission cannot be as narrow as the government insists.

Congress drafted NEPA in broad terms, directing that all federal agencies should comply with NEPA "to the fullest extent possible." 42 U.S.C. 4332. It expressly directed that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." 115 Cong. Rec. 39,702, 39,703 (1969) (statement of House conferees); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (CADC), *cert. denied* 502 U.S. 994 (1991) ("[A]n agency may not define the objectives of its action in terms so unreasonably narrow . . . [that] the EIS becomes a foreordained formality."). But that is exactly what the government has done by portraying, albeit incorrectly, the FMCSA as simply a safety agency with respect to which environmental issues cannot enter the decisionmaking process.

2. The FMCSA Has Discretion to Choose Environmentally Protective Alternatives When Issuing Regulations

The government again attempts to avoid the force of its concession that NEPA applies to the FMCSA's rulemaking by claiming that the FMCSA's actions are purely ministerial and that, therefore, an EIS would not further NEPA's aim to influence agency decisionmaking. U.S. Br. 38-39. While it may be true that the FMCSA must grant authorization to all motor carriers that are "willing and able to comply with" its regulations, *see* 49 U.S.C. 13902(a)(1), and while it is certainly true that the FMCSA "did not have the discretion to countermand any determination by the President that Mexican carriers would no longer be barred," U.S. Br. 39, those observations are beside the point. The FMCSA will exercise discretion and independent judgment in determining (1)

whether to promulgate regulations at all, and, if so, (2) the precise content of those regulations. Neither in Section 350 nor anywhere else has Congress constrained the agency's discretion over these matters.

Both within the agency proceedings and during this litigation, the United States has repeatedly recognized a correlation between safety and environmental concerns when regulating Mexico-domiciled trucks. As the FMCSA's EA candidly explains, the agency "expects to target the highest risk [trucks] and bring them into compliance with United States safety and *environmental* laws, standards, policies, rules, and regulations." J.A. 193 (emphasis added). Further, the FMCSA stated in the court of appeals that its safety regulations would disproportionately affect older (pre-1993) Mexican trucks. J.A. 484. These are exactly the subset of trucks that release the most emissions. The stricter the safety regulations the agency chooses, the less pollution there will be from Mexico-domiciled trucks that travel outside the border zone.

The FMCSA is not constrained by its governing statute or any other law from considering this acknowledged correlation between safety and environmental protection in choosing among regulatory alternatives presented in a comprehensive EIS. For instance, the FMCSA or another agency charged with regulating the transportation of hazardous materials like the Research and Special Programs Administration of the Department of Transportation, *see* 49 U.S.C. 112; 49 C.F.R. 171-80, could use data from a properly conducted EIS to determine whether additional safety regulations are necessary for Mexico-domiciled trucks that carry hazardous materials, whether special routes for such trucks should be developed, or whether increased administrative enforcement may be necessary. With more comprehensive environmental information from the EIS, the FMCSA could possibly avert safety and environmental catastrophes through affirmative decisionmaking at the front end, just as NEPA intends.

Since the FMCSA retains non-ministerial discretion to regulate Mexico-domiciled trucks traveling beyond the border zone, under NEPA the agency "is not only permitted, but compelled, to take environmental values into account." *Calvert Cliffs*, 449 F.2d at 1112.

B. The EIS Would Provide Important Information to the Public, to Congress, and to the President

In addition to providing information for the FMCSA, NEPA's EIS requirement serves broader informational purposes. First, NEPA review provides valuable information to the public, both informing it about the environmental effects of government action and verifying that the government has taken those effects into account in making its decisions. *See Methow Valley*, 490 U.S. at 349 (recognizing that the publication of an EIS "provides a springboard for public comment"); *Baltimore Gas*, 462 U.S. at 97 (stating that NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns"); *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (CADC 2002) (noting an EA's purpose of providing relevant information regarding the cumulative effects of multiple actions to the public). Providing information to the public also encourages public involvement in and response to agency decisionmaking. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1285-86 (CA1 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997) (taking note of NEPA's purpose of informing the public and allowing the public to "offer its insight to assist the agency's decision-making"); *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 296 (CADC 1988) (enunciating NEPA's purpose of informing "the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action").

Second, NEPA provides both Congress and the President with valuable information. *See Hodel*, 865 F.2d at 296 (declaring that the purpose of NEPA includes informing non-acting agencies and Congress and noting an EIS's value as "environmental source material" for Congress and the executive); *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (CADC 1971) (noting informational value of NEPA statements for Congress and the President, "who has broad concern even when not directly involved"); *see also* S. Rep. No. 91-296, at 21.

The FMCSA's failure to prepare an EIS in this case has subverted the informational and disclosure objectives that lie at the heart of NEPA. Neither the agency decisionmakers nor the "larger audience" that NEPA was intended to serve, *see Methow Valley*, 490 U.S. at 350, have been provided with the environmental analysis necessary to make an informed choice among alternatives. As a result, neither Congress, nor the President, nor the public have been informed of the environmental effects that will be wrought by the impending influx of Mexico-domiciled trucks beyond the border zone.

C. The EIS Would Assist States in Meeting Their Obligations Under the Clean Air Act

The FMCSA's failure to comply with NEPA also frustrates NEPA's central purpose of enabling "other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh*, 490 U.S. at 371. By requiring that agencies consider the long-term direct, indirect, and cumulative effects of their actions, *see* 40 C.F.R. 1508.7, .8, .25(c), .27(a), NEPA provides other governmental entities with "the opportunity to plan and implement corrective measures in a timely manner." *Methow Valley*, 490 U.S. at 350 (noting that the analysis of private off-site development activities in an EIS prepared by the Forest Service serves a notice and planning function for agencies regulating air quality and wildlife conservation).

The need to give notice to other governmental bodies is nowhere more keenly felt than in the context of states' obligations under the CAA. State air quality programs must account for and accommodate all actions affecting state air quality standards. *See* 42 U.S.C. 7407. Regions that already suffer from grave air pollution problems run the serious risk of losing federal transportation funding if the influx of pollution from Mexico-domiciled trucks prevents states from creating transportation plans that comply with CAA requirements. Information provided by NEPA review is essential to enable state and regional agencies to fulfill their CAA obligations. Such data afford states the opportunity to "implement corrective measures" before the impacts of those actions are felt. *Methow Valley*, 490 U.S. at 350.

Contrary to the government's claims, a full EIS in this case would serve NEPA's central goals. The FMCSA's failure to prepare an EIS that adequately reviews the local pollution impacts of increased Mexican truck traffic beyond the border zone has left states whose air quality will unquestionably be affected by this influx without any of the "relevant environmental information" they require to meet their attainment obligations under the CAA. *Methow Valley*, 490 U.S. at 350. These states lack data regarding the "expected consequences" of both direct agency actions and foreseeable nonagency actions, which is the very information NEPA was created to provide. *See id.*; *see also* 40 C.F.R. 1508.7, .8, .25(c), .27(a). Moreover, since applications by Mexican carriers to operate outside the border zone are regulated solely by the FMCSA, the environmental impacts of granting these applications might not be measured or considered at all unless the FMCSA completes an adequate EIS. NEPA was enacted precisely to prevent such a result. *See* 42 U.S.C. 4332; S. Rep. No. 91-296, at 5-9.

IV. THE FMCSA'S FAILURE TO PERFORM A CONFORMITY REVIEW VIOLATED THE CLEAN AIR ACT

Not only did the FMCSA fail adequately to perform its obligations under NEPA, but it also failed to meet its distinct "conformity review" obligations under the CAA. These obligations are wholly separate from the agency's obligations under NEPA. NEPA review is governed by the CEQ regulations, *see* 40 C.F.R. 1500 *et seq.*, while CAA conformity analysis is performed under regulations and standards promulgated by the EPA. *See* 42 U.S.C. 7506, 7509, 7510; 40 C.F.R. 93.150-.160. Thus, even if the Court were to find that no EIS was required in this case, the court below nevertheless correctly held that the FMCSA failed to comply with the separate conformity review provisions of the CAA.

Under the CAA, all federal agencies carry an "affirmative responsibility" to perform a "conformity analysis" of the air pollution impacts from direct and indirect emissions caused by agency action. 42 U.S.C. 7506; 40 C.F.R. 93.152, .154. In promulgating its safety regulations, the FMCSA relied on a flawed EA to conclude that its actions would not create sufficient air quality effects to trigger conformity review. J.A. 146-67. The FMCSA assessment erred in two respects: it failed to analyze those impacts by region, and it failed to analyze the proper range of actions and impacts on air quality.

First, the FMCSA was required to review emissions impacts on a regional basis. The CAA measures air quality control regionally, and all measurements of attainment or nonattainment must be taken accordingly. *See* 42 U.S.C. 7407(a) (requiring attainment of air quality standards "within each air quality control region"). Conformity analyses must do the same. *See, e.g.*, 40 C.F.R. 93.152 (defining prohibited federal actions as those that cause CAA violations at "location[s] in a nonattainment or maintenance area"); *id.* § 93.153(b) ("[C]onformity determination is required for each

pollutant . . . in a nonattainment or maintenance area."). The FMCSA failed to conduct such an analysis, opting instead to analyze emissions impacts on a national scale. J.A. 147, 167. Tellingly, the government's brief fails to address this requirement at all. Rather, it merely points to the potential "delay[]" to the President's "effort" to comply with NAFTA that proper conformity analysis might cause. U.S. Br. 47. Given that NAFTA in no way alters the requirements of the CAA, *see* 19 U.S.C. 3312, the government's non-answer cannot avoid the inescapable conclusion that the FMCSA's failure to analyze emissions impact on a regional basis violates its CAA conformity obligations.

Second, the FMCSA had to analyze a broader scope of emissions than it considered in its air quality analysis. EPA regulations require that federal agencies conduct conformity review when the sum of direct and indirect emissions "caused by the Federal action" will equal or exceed regional threshold levels established by EPA. 40 C.F.R. 93.152. The regulations further define "caused by" to mean "emissions that would not otherwise occur in the absence of the Federal action." *Id.* Thus, an emission that would not occur absent the action in question, regardless of other actions or causes for those emissions, is "caused by" the action for purposes of CAA conformity review. Under this regulatory scheme, any emissions created by Mexico-domiciled trucks operating beyond the border zone are "caused by" the FMCSA's promulgation of safety regulations, since without those regulations, no such truck traffic would occur. *See supra* at 12.

The EPA's definition of "indirect emissions" likewise compels the FMCSA to analyze Mexican carrier emissions more broadly. An agency must consider emissions "caused by" the Federal action when the agency "can practicably control and will maintain control over [the emissions] due to a continuing program responsibility of the Federal agency." 40 C.F.R. 93.152. Through its permitting responsibilities, inspections, audits, and other compliance programs, the

FMCSA both can and will maintain control over Mexican carriers traveling beyond the border zone. *See* 49 C.F.R. 385.103 (establishing a "safety monitoring system" with "frequent roadside inspections" and a safety audit program for Mexico-domiciled trucks). This control will extend through an eighteen-month compliance period established for each Mexican carrier and thereafter through ongoing general regulation by the FMCSA. *Id.*; *see also id.* § 385.119. The government's representations to the contrary, U.S. Br. 46, are therefore incorrect.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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In The
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DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

PUBLIC CITIZEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, ARIZONA, ILLINOIS, MASSACHUSETTS, NEW MEXICO, OKLAHOMA, OREGON, WASHINGTON AND WISCONSIN IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, under the National Environmental Policy Act, 42 U.S.C. § 4332, agency action that Congress made a prerequisite to allowing Mexico-domiciled trucks to operate throughout the United States is subject to an Environmental Impact Statement that will disclose and evaluate the serious environmental effects caused by such trucking.

2. Whether, under the conformity provision of the Clean Air Act, 42 U.S.C. § 7506(c)(1), that agency action requires an analysis into the extent to which permitting Mexico-domiciled trucks to operate throughout the United States will make it difficult for states to comply with federal air quality standards.

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INTEREST OF *AMICI* STATES

Amici States submit this brief in support of Respondents because regulations adopted by the Federal Motor Carrier Safety Administration in purported furtherance of the North American Free Trade Agreement would allow Mexican diesel trucks that lack the full range of air pollution controls found on trucks that meet U.S. EPA and State of California emissions standards to enter already polluted air basins, raising the level of ozone and toxic pollutants that potentially millions of *amici* States' residents must breathe. *Amici* States do not know the full extent of the environmental damage FMCSA's regulations may cause, because FMCSA has not complied with NEPA and made the analysis and full public disclosure that would provide that information. They are sure that the impacts will be serious enough to require mitigation, but cannot know what level of mitigation to plan for, because the federal agency here has not complied with its obligations under NEPA. Neither has it complied with its obligations under the Clean Air Act to perform a "conformity analysis" to determine whether registering Mexican-domiciled trucks and allowing them to operate across the country would violate or conform to state clean air plans. *Amici* States urge the Court to affirm the judgment of the Court of Appeals.

STATEMENT OF THE CASE

NAFTA was signed by then-President Clinton in 1992, and enacted by a majority vote of each house of Congress in 1993. 19 U.S.C. §§ 3301-3473. One part of NAFTA was an agreement between the United States and Mexico to address a long standing dispute between those two

countries regarding the ability of trucks owned by Mexican carriers to operate in the United States. In 1980, in response to unfair competition concerns, Congress passed the Bus Reform Act. 49 U.S.C. § 10922(l)(1) (repealed). That law banned Mexican-domiciled trucks from operating in the U.S. beyond a narrow (usually 20 miles) zone at the U.S. border. Congress later specifically gave authority to the President to lift the ban if he made certain findings. 49 U.S.C. § 13902(c)(3), reprinted in Appendix to FMCSA brief at 10a-11a. President Bush lifted the moratorium in response to a decision by a NAFTA arbitration panel.

Before the President lifted the moratorium, Congress enacted Section 350 to the DOT Appropriations Act of 2002; it subsequently renewed Section 350 for 2003 and 2004. *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130. Section 350 (reprinted in the Appendix to FMCSA's brief at 12a-20a) sets out truck-safety requirements that FMCSA must ensure before it may expend any funds to register trucks for operation outside the border area.

In response to Section 350, FMCSA issued regulations. The agency also prepared an Environmental Assessment (EA) for the regulations, as called for by the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1508(18). The EA examines air quality emission impacts for only a one-year fixed period, 2002. The EA did not assess the air quality impacts of increased emissions and increased ambient pollutant levels resulting from operation of the Mexican-domiciled trucks on any *local* areas in the U.S. Nor did the EA make a localized analysis of air quality impacts on any areas

that currently do not comply with existing federal air quality standards, or more stringent state air quality standards, *see* EA, at C-1 to C-10, despite the fact that compliance with state and federal air quality standards is analyzed under the Clean Air Act on an air-basin level, not the national-average level assessed by the EA. JA 316. The independent report submitted to FMCSA by the California Attorney General did a localized analysis of the potential impacts on California's Imperial Valley from the operation there of Mexican-domiciled trucks, and that analysis showed an increase of nearly one-third of a ton per day of oxides of nitrogen from these trucks. JA 402. The Mexican-domiciled trucks currently emit, on average, about 1.3 times as much oxides of nitrogen, nearly twice as much particulate matter, and twice as many volatile organic compounds as the average U.S.-domiciled truck. The disparity will increase with time, so that in 2020 the average Mexican-domiciled truck will emit about 6.7 times as much oxides of nitrogen and about four times as much particulate matter as its U.S. counterpart. JA 426. In addition, the EA did not assess cancer or other health risks from the increased pollutant emissions of the Mexican-domiciled trucks.

FMCSA also did not include, as part of its rule-making process, an analysis of the conformity of its regulations with State Implementation Plans ("SIPs") prepared and adopted by the States under the Clean Air Act to meet the national ambient air quality standards. 42 U.S.C. § 7410.

Petitioners below brought a challenge in the Ninth Circuit Court of Appeals to the issuance of these regulations without adequate compliance with NEPA and the Clean Air Act. FMCSA contended that the President's action in lifting the moratorium was the sole effective

cause of all emissions from Mexican-domiciled trucks, and that the President was exempt from both NEPA and the Clean Air Act. The Court of Appeals held that both NEPA and the Clean Air Act's conformity requirements were applicable to FMCSA's regulations, and that FMCSA had failed to comply adequately with either statute.

SUMMARY OF ARGUMENT

The States are concerned about FMCSA's parsimonious view of the Clean Air Act and NEPA, two seminal statutes that represent sweeping federal commitments to the environment, to states, and to citizens. They are also concerned about FMCSA's unfounded attempt to justify its actions through portrayal of this case as a foreign affairs crisis of constitutional magnitude. This brief focuses on the harm that FMCSA's positions would cause to the law and to the federal government's commitment to help the States meet federal air quality mandates, rather than hinder them.

This case presents no constitutional issue, nor does it impinge upon the President's foreign affairs powers. Statutes, as this Court has squarely held, do not mean something different merely because they affect foreign commerce or foreign affairs. The Clean Air Act and NEPA apply to FMCSA with precisely the same meaning and vigor here as they would in any other situation. Moreover, because of its plenary power over foreign commerce, Congress is free to place conditions on the manner in which Executive Branch agencies implement trade agreements. Congress expressly preserved federal environmental laws when it passed NAFTA's authorizing

legislation. FMCSA is not being asked to review the effects of an action by the President, just its own action. This Court has already held that its sole task in such a case is to determine the scope of the federal agency's duties under the applicable statutes (here, the Clean Air Act and NEPA), using traditional rules of statutory construction, with no special deference to the Executive Branch's foreign affairs concerns.

FMCSA is required to perform an analysis, determine whether its action is in conformity with the States' clean air plans, and either mitigate, provide emissions offsets for, or abandon that action if the action is not in conformity. FMCSA's narrow view of the Clean Air Act would undermine the Act's purpose, structure, and effectiveness. The Clean Air Act has an ambitious goal: clean, healthy air in every community in the nation. Using a structure of cooperative federalism, Congress directed the States to meet federal air quality standards but gave them broad discretion on how to formulate plans to do so, *i.e.*, in their "State Implementation Plans" (SIPs). Congress also made an extraordinary pledge that no instrumentality of the federal government shall engage in, support in any way, permit, or approve any activity that does not conform to the applicable SIP. Thus, prior to taking any action that could do so, every federal agency must review the applicable SIP for conformity and make an affirmative finding that its activities will not hinder the state's efforts. FMCSA's issuance of the regulations at issue would remove a bar to Mexican-domiciled trucks – a discretionary decision that Congress vested in FMCSA. There is no question that the truck emissions will undermine state air quality implementation plans, particularly in those states where air is already heavily polluted – areas where huge

decreases, not increases, in emissions are vital to meeting the federal clean air standards. FMCSA must perform a conformity analysis for its regulations, and may be obligated to provide significant mitigation measures or offsetting reductions in existing pollutant emissions to compensate for the increased truck emissions that will occur if the Mexican-domiciled trucks operate nationwide.

Our discussion of the NEPA question focuses on the problems with FMCSA's proposed new causation rule. If adopted, FMCSA's rule could allow an agency to disclaim responsibility for the environmental effects of its own discretionary actions, based on a narrow reading of the "division of responsibilities" between federal agencies. Under NEPA, however, the effects for which an agency is responsible are primarily determined by the scope of the federal agency's discretionary action, not statutes that allocate agency responsibilities, such as authorizing statutes. If an agency has discretion to take action, it presumably also has authority to do so, and NEPA makes it liable for full disclosure of all of the foreseeable significant effects on the physical environment of its action. Moreover, this Court has held that NEPA requires federal agencies to interpret statutes broadly in favor of NEPA's purposes unless another statute renders compliance impossible, which is not the case here. Additionally, FMCSA offers no standards for courts to apply its rule, and none are evident in the language, purposes, or legislative intent of NEPA. Finally, FMCSA's proposed rule would undermine NEPA's informational purpose and deprive states and local communities of NEPA's benefits.

ARGUMENT

I. THIS COURT HAS HELD THAT ITS SOLE TASK IN A CASE LIKE THIS IS TO APPLY TRADITIONAL RULES OF STATUTORY CONSTRUCTION TO THE APPLICABLE STATUTES, WHICH HERE ARE THE CLEAN AIR ACT, NEPA, AND SECTION 350. THE PRESIDENT'S CONSTITUTIONAL FOREIGN AFFAIRS POWERS AND THE NAFTA – WHICH ITSELF ALLOWS THE U.S. TO ENFORCE ITS ENVIRONMENTAL STANDARDS – ARE IRRELEVANT TO THE MEANING OF THESE STATUTES.

A. The President's Foreign Affairs Powers Are Not Implicated By This Case.

As a threshold matter, it is necessary to dispose of two arguments that FMCSA makes as part of its attempt to inject foreign affairs concerns into this case. First, FMCSA claims that its statutory duties are altered by the President's *constitutional* foreign affairs powers. FMCSA Br. 20. Second, FMCSA obliquely suggests that a different rule of statutory construction applies in this case, i.e., the Clean Air Act and NEPA should be interpreted to avoid interference with the Executive Branch's foreign trade policies. FMCSA Br. 37. In an era of global trade, domestic statutes such as NEPA and the Clean Air Act will often affect foreign affairs and foreign commerce. But that fact does not change the meaning or scope of the statutes or encroach upon the President's constitutional foreign affairs powers.

This Court confronted a similar conflict between a congressional enactment and the Executive Branch's foreign policy in *Japan Whaling Association v. American*

Cetacean Society, 478 U.S. 221 (1986). Congress enacted a law that required the President to impose specific economic sanctions on a country if the Secretary of Commerce certified that the country had undermined an international convention that sets quotas on whale harvests. Japan violated a quota. But the Secretary did not make the certification, and, rather than impose sanctions, the Executive Branch negotiated an agreement with Japan. The question was whether the relevant statutes required the Secretary to make the certification. Two lower courts held that it did. In this Court, a group of Japanese petitioners attempted to convert the statutory issue into a constitutional one when they argued that the case presented a nonjusticiable political question because a decision against the Secretary would effectively require the Executive Branch to repudiate an agreement with a foreign country. *Id.* at p. 229.

This Court held that the foreign affairs implications were irrelevant. "We are cognizant of the interplay between [the statutes at issue] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. Indeed, the case presented "a purely legal question of statutory interpretation," said the Court. *Id.* "The Court must first determine the nature and scope of the duty imposed on the Secretary by the [statutes], a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below." *Id.*

Here, too, the foreign affairs implications of FMCSA's compliance with the law are irrelevant. The Court must determine the nature and scope of the duty imposed on FMCSA by NEPA and the Clean Air Act. This is a purely legal question, and the relevant statutes must be interpreted according to traditional rules of statutory construction. The statutes apply to FMCSA with the same meaning and vigor that they would apply in any other situation.

Finally, FMCSA's concern that its compliance with the law would be expensive and time-consuming, or that it would impair trade with Mexico, is an issue for Congress, not the courts. Because Congress has plenary power over foreign commerce, U.S. Const., art. I, § 8, cl. 3, it is free to place conditions on Executive Branch agencies that implement trade agreements. If the President believes that the conditions interfere with his foreign trade agenda, his opinion is "merely precatory." *See*, *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994). The President has no discretion to order FMCSA to "act contrary to the will of Congress when exercised within the bounds of the Constitution." *Japan Whaling*, 478 U.S. at 233; *see* also, *Dames and Moore v. Regan*, 453 U.S. 654, 669 (1981) ("when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions only by disabling the Congress from acting on the subject."); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (declaring void an executive agreement between the United States and Canada that conflicted with a congressional enactment), *aff'd*, 348 U.S. 296 (1955). The President's role is to "take Care That the Laws be faithfully executed." U.S. Const., art. II, § 3.

B. Congress Has Directed That NAFTA Compliance Should Not Change Or Diminish Federal Compliance With U.S. Environmental Statutes.

Congress, of course, has done nothing to suggest that FMCSA or any other agency may forgo compliance with federal environmental laws when they implement NAFTA. On the contrary, when it enacted NAFTA's implementing legislation, Congress expressly preserved federal environmental law: "Nothing in this Act shall be construed . . . to amend or modify any law of the United States, including any law regarding . . . the protection of the environment." 19 U.S.C. § 3312(a)(2)(A)(ii). Consequently, if this Court holds that FMCSA must prepare an EIS and comply with the Clean Air Act, the Court would merely be requiring an Executive agency to follow the will of Congress.[1]

In short, this case presents no constitutional issue, and no special deference is owed FMCSA merely because the Court's decision may have foreign affairs implications. The Court's task is to apply traditional rules of statutory construction to the Clean Air Act, NEPA, and Section 350. The President's constitutional foreign affairs powers and foreign trade goals are not relevant to the meaning of these statutes.

[1] Moreover, we note that Congress appears less concerned with delay here than the Executive Branch, in light of the fact that Congress blocked Mexican-domiciled trucks through moratoria or funding restrictions no less than five times in the past 22 years, including three times after the President expressed his desire to allow the trucks. FMCSA Br. 4-5, 9-10.

II. FMCSA HAS VIOLATED THE CLEAN AIR ACT'S CONFORMITY REQUIREMENT BY FAILING TO ANALYZE THE AIR POLLUTION EFFECTS OF ITS REGULATIONS PRIOR TO ISSUING THE REGULATIONS.

A. The Conformity Requirement Is An Affirmative Responsibility Of Every Federal Agency, Intended To Ensure That Federal Actions Dovetail With And Do Not Undermine State Air Quality Plans.

The Clean Air Act is a paradigm of cooperative federalism, *Connecticut v. Environmental Protection Agency*, 696 F.2d 147, 151 (2d Cir. 1982), with state and federal governments working together to protect public health. However, although Congress gave to the federal government the lead role in deciding how clean the air must be to assure protection of the public health, it gave to the state governments the lead role in deciding how the air will actually be cleaned and kept clean. *American Trucking v. Whitman*, 531 U.S. 457, 470 (2001) ("It is to the States that the Act assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.")

As part of that commitment to respect and assist the primary role of the States in controlling air pollution, Congress enacted the "conformity" requirement, 42 U.S.C. § 7506. It provides, in pertinent part:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to a [State] implementation

> plan after it has been approved or promulgated under Section 7410 of this title.

42 U.S.C. § 7506(c)(1). Congress' intent in the conformity requirement is simple and two-fold. First, having assigned to the States the task of meeting federal clean air standards, Congress has simultaneously forbidden the federal government and all its agencies and instrumentalities from taking, approving, or supporting actions that would get in the way of the States as they endeavor to meet this congressional mandate. Second, Congress has specified the method that federal agencies must use to ensure that they do not get in the States' way: They must ensure that federal actions are consistent – that they "conform" to – the mix of strategies, emissions control measures, percentages of required emissions reductions, land use controls, and other regulations and requirements that make up the State's SIP. *Id.*

A finding of conformity with the SIP is an affirmative duty of the head of the federal agency *prior* to undertaking the action. 42 U.S.C. § 7506(c)(1); *EDF v. EPA*, 167 F.3d 641, 643 (D.C. Cir. 1999). Congress defined conformity to a SIP, in pertinent part, as a finding by the federal agency:

> (B) that [federal] activities will not –
>
> (i) cause or contribute to any new violation of any [federal air quality] standard. . . . "
>
> (ii) increase the frequency or severity of any existing violation of any standard . . . ; or
>
> (iii) delay timely attainment of any standard or any required interim emission reduction or other milestones in any area."

42 U.S.C. § 7506(c)(1). This definition is very broad. The new pollutant emissions will not be in conformity with a SIP if they will either cause *or contribute to* any new violation of a federal air quality standard, and if they will merely *delay*, not actually prevent, attainment of a federal standard.

Federal agencies whose actions would not conform to the applicable SIP can bring those actions into conformity by mitigation measures that reduce the emissions, or by providing or obtaining offsetting reductions in some source of current emissions, so that the total of emissions in the affected area does not rise because of the federal action. 58 Fed.Reg. 63214, 63238 (Nov. 30, 1993).

B. A Conformity Analysis Is Required For FMCSA's Regulations, Because They Are Likely To Worsen Violations Of The Federal Air Quality Standards, In Direct Contravention Of The Clean Air Act.

FMCSA failed to prepare any conformity analysis for its regulations. However, evidence submitted to FMCSA by the State of California, and to the Ninth Circuit by respondents, shows that such a conformity analysis is required under the Clean Air Act and that FMCSA acted in an arbitrary and capricious manner by not performing one. As that evidence shows, many of the areas through which the Mexican-domiciled trucks would be driving have ambient air pollutant concentrations that currently far exceed the health-based federal air quality standards for oxides of nitrogen and particulate matter, pollutants that heavy-duty diesel trucks produce. JA 330. In such areas, the air is already so bad that *any* additional pollutant emissions must and will "increase the frequency or severity of any

existing violation of any standard," and may also "contribute to" new violations of the standards. An analysis and prediction of the increased emissions that can be expected from these trucks was done by both California and respondents. JA 332-339, 397-403. The increased emissions will also almost certainly "delay timely attainment" of "required interim emission reduction or other milestones" in areas where federal clean air standards are already exceeded by wide margins, and huge decreases in emissions are needed to meet even interim goals on the way to meeting the federal standards. *See* Brief of *amicus curiae* South Coast Air Quality Management District. In such States as California, Arizona, and Texas, where the trucks would drive through areas designated as having "serious," "severe," or "extreme" ozone pollution, JA 100, 319-320, the additional contribution from the trucks would worsen an already critical air pollution problem. In addition, the particulate emissions from diesel vehicles are carcinogenic, Cal. Code of Regs., tit. 22 § 12000, and have been estimated to be responsible for up to 70% of the cancer risk from air pollution in the greater Los Angeles area. JA 405. According to a prominent toxicologist who has served as a consultant to the EPA's Clean Air Scientific Advisory Committee, the increased diesel emissions could cause actual cancers and deaths; this is a real and not an academic problem. JA 445-446.

FMCSA does not dispute that the Mexican carrier trucks will further pollute already critically polluted areas. Rather, FMCSA argues that its regulations are not covered by the conformity requirement because the agency

has insufficient control over the emissions of the trucks that would be registered under its regulations.[2] FMCSA misreads the statute and applicable regulations.

1. FMCSA's Regulations Support And Approve The Mexican-domiciled Trucks' Increased Pollution, Because The Regulations Permit And Enable The Trucks To Operate In The United States Beyond The Border Area.

FMCSA claims exemption from the conformity requirement because its regulations are not the cause of the increased air pollution that the trucks would add to California's and other States' air. It argues that only the act of the President's lifting of the moratorium, in purported furtherance of the NAFTA trade agreement, is responsible for these increased emissions. FMCSA Brief at 42-43. FMCSA is wrong.

The Clean Air Act conformity provision is not predicated on actual "but-for" causation. Rather, Section 7506(c)(1) is much broader; it forbids federal agencies from "support[ing] *in any way* . . . licens[ing] or permit[ting], or approv[ing]" any activity that does not conform to a SIP. 42 U.S.C. § 7506(c)(1) (emphasis added). FMCSA's registration of the trucks falls within the conformity requirement because it *supports* their operation by enabling the Mexican-domiciled trucks to operate where they otherwise

---

[2] In the Ninth Circuit, FMCSA argued that it also qualified for an exemption for rule-making activities. It has explicitly waived that argument here. FMCSA Brief at 14, note 6.

cannot. FMCSA's registration of the trucks is also covered by the prohibition on licensing, permitting, or approving new pollution sources that are not accounted for in the applicable SIP. Under the plain words of the statute, FMCSA's discretionary decision to adopt regulations falls squarely within the conformity requirement, because the regulations support and approve the operation of these trucks.

Both the President's action in lifting the moratorium *and* FMCSA's action in carrying out Section 350 are necessary before Mexican-domiciled trucks can operate throughout the United States. The President's lifting of the moratorium did not itself cause any truck emissions, since his lifting of the moratorium did not allow the trucks to enter the U.S. beyond the border area. Congress made the FMCSA's assurance of truck safety a separate and independent requirement that must be met before the trucks can enter. As such, FMCSA's activities support and approve the truck operation and emissions, and fall within the ambit of the conformity provision.

Section 350 is also more than the imposition of a duty; it is a grant of discretion. Congress did not require FMCSA to adopt regulations applicable to Mexican-domiciled trucks, indeed, it did not order FMCSA to act at all.[3]

[3] FMCSA suggests that it was required to issue regulations in light of the President's decision to lift the moratorium and that Congress did not intend section 350 to bar trucks in the event that the President chose to do so. FMCSA Br. 35. Not so. Congress relied upon FMCSA and the Department of Transportation to determine, for example, whether the Mexican government had the adequate information infrastructure and law enforcement resources for an effective program; whether there is sufficient border capacity to permit meaningful inspections; and

(Continued on following page)

Rather, Congress required that if the trucks were to operate beyond the border area, they could do so only if FMCSA could ensure their safety through safety inspections, verification of safety management practices, insurance, and other means. And Congress forbade FMCSA to process any applications for permission to operate outside the border zone until it has ensured that safety. Appendix to FMCSA's Brief at 12a-13a. The means by which FMCSA was to perform its verifications and reviews, as well as how it was to carry out many more general standards, such as an "evaluation" of a carrier's safety practices, were not specified by Congress, but were left to FMCSA's discretion. The agency's choice to carry out Section 350 through adoption of regulations, as well as the form, content, and scope of those regulations, was an exercise of discretion by FMCSA. FMCSA exercised that discretion in its regulatory choices as to the precise requirements, timing, methods of showing compliance, and so on, by which generalized congressional standards were to be met. *See* 40 C.F.R. § 1508.23 (federal action subject to NEPA arises "at the stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal. . . . ") FMCSA could also use that same discretion to limit the operation of the oldest and most polluting trucks beyond the border area, reducing emissions. By not doing so, it is supporting,

whether, overall, "the opening of the border does not pose an unacceptable safety risk to the American public." Pet. App. 20a. It did not specify how FMCSA was to carry out these responsibilities. When Congress definitely intends that an agency adopt regulations, it knows how to say so unambiguously. 42 U.S.C. §§ 7411(d), 7412(d).

permitting, licensing, and approving these new sources of toxic air contaminants without determining whether applicable SIPs account for such sources.

2. Under Its Regulations, FMCSA Will Have Continuing Program Responsibility For The Emissions Of The Mexican-domiciled trucks, Rendering Them Subject To The Conformity Regulations.

FMCSA further disclaims any obligation to perform a conformity analysis for its regulations because: (1) the emissions from the trucks it registers ands regulates do not occur at the time of registration, and are therefore not "direct" emissions under the EPA conformity regulations; and (2) the emissions of trucks after registration are not sufficiently within FMCSA's control to fit the definition of "indirect emissions" that are covered under U.S. EPA's conformity regulations. This is a misreading of the EPA regulations.[4]

EPA's conformity regulations provide that the emissions caused by a federal action must be included in the conformity analysis as "indirect emissions" if the emissions are "reasonably foreseeable," and the agency has "continuing program responsibility" relating to those emissions, and can "practicably control" them in some

[4] While FMCSA is entitled to deference from the courts for reasonable interpretations of its own statute, interpretation of the conformity requirement is entrusted to EPA, not FMCSA. Accordingly, FMCSA's interpretation of the Clean Air Act and the EPA regulations are not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1115-16 (D.C. Cir. 2001).

fashion. 40 C.F.R. § 93.152. FMCSA does have continuing program authority over the trucks under the regulations at issue here. Those regulations allow FMCSA to register the trucks, and they provide that the agency will regulate and verify inspections of the trucks on a continuing basis as part of its regular responsibilities for regulating motor carrier safety. 49 C.F.R. § 365.511; 49 C.F.R. Parts 382, 383, 384, 391, 393, 395. Further, as discussed previously, actions that will directly affect the amount of pollutants that will be emitted by the trucks are fully within FMCSA's control. FMCSA can control the stringency of the safety standards it prescribes in its regulations, and the degree of stringency it chooses will directly affect which trucks are given permission to operate outside the border area and which are not. This is sufficient control to bring the truck emissions within the definition of "indirect emissions."

C. FMCSA Is Fully Able To Comply With The Conformity Requirement. If It Finds That Requirement Too Onerous, Its Remedy Lies With Congress, Not The Courts.

FMCSA also argues that it should be excused from complying with the Clean Air Act's conformity mandate because compliance is too burdensome:

> If FMCSA were required to complete [a conformity] analysis, and if it concluded that the President's decision to open United States markets to Mexican carriers will cause an increase in air [pollutant] emissions above regulatory thresholds in any of the studied regions, then FMCSA would not be able to promulgate its safety rules – and the President's efforts to bring the United States into compliance with its obligations under NAFTA and the arbitration decision of February

> 2001 would be further delayed – unless "conformity" to state air-quality plans somehow could be achieved.

FMCSA Brief, at 47.

FMCSA here asks this Court to choose among the statutes it will enforce, and asks the Court to allow the agency to help carry out NAFTA at the expense of the Clean Air Act. But as the District of Columbia Circuit has said, "[i]f this legislative scheme [i.e., conformity] is too onerous, it is up to Congress to provide relief, not this court." *EDF v. EPA*, *supra*, 167 F.3d at 651.

Congress specifically directed that "*no* department, agency, or instrumentality of the Federal government" can undertake, support, permit, or approve any action that is not in conformity with the applicable SIP. 42 U.S.C. § 7506(c)(1) (emphasis added). Congress did not provide an exemption for actions that forward compliance with NAFTA or, indeed, with any other federal goals.[5]

FMCSA is not without a means of assuring conformity, since it can do what a private business in a similar

[5] By contrast, Congress did provide a compelling national interest exemption in its waiver of federal sovereign immunity in the Clean Air Act. Section 118(b) of the Clean Air Act allows the President to exempt any federal agency's own emissions sources from the Act's waiver of sovereign immunity "if he determines it to be in the paramount interest of the United States to do so." 42 U.S.C. § 7418(b). That Congress provided an exemption to another federal-government-wide requirement in the Clean Air Act, but provided no such exemption to the conformity provision, is textual evidence that Congress intended no such exemption. *American Trucking v. Whitman*, 531 U.S. at 467.

situation would do: It can obtain offsets for the pollutant emissions its actions will cause. That is, FMCSA can obtain decreases in existing emissions from other federal agencies in the areas where such decreases are needed, or can pay existing private sources of pollutant emissions to reduce their emissions in an amount that offsets the increases from the Mexican-domiciled trucks, to the point where the emissions expected from these trucks do not exceed what was planned for in the applicable SIPs. This alternative is already required of businesses that wish to build a new source of pollution in an area that currently violates federal air quality standards. *See* 42 U.S.C. §§ 7503 and 7511a(a)(4), (b)(5), (c)(10), (d)(2), (e)(1).

III. FMCSA ALSO VIOLATED NEPA WHEN IT FAILED TO PREPARE AN EIS.

FMCSA proffers a new causation rule for assessing the agency's obligations under NEPA. FMCSA urges that a "manageable line" be drawn between the environmental effects for which it is responsible and those for which the President is responsible, based on each one's statutory and constitutional responsibilities, FMCSA Br. 34, and the "structure of the government." FMCSA Br. 37. FMCSA's proposed NEPA rule could apply broadly in other cases where an agency would ordinarily have a duty to prepare an EIS – i.e., where the agency has discretion to take action, and the action would cause significant effects on the physical environment.[6] Its rule would allow an agency to disclaim

[6] FMCSA argues separately that it lacks discretion. FMCSA Br. 38-40. It concedes that its action is at least a but-for cause of the emissions. FMCSA Br. 33-34.

responsibility for effects caused by its own discretionary action on the grounds that another entity is more "responsible" for the effects.

This approach has no basis in NEPA or its implementing regulations; it would undermine NEPA's informational purpose, and it would deprive states and local communities of NEPA's benefits. Federal agencies are responsible for all the significant effects on the physical environment caused by their own discretionary decisions.

A. FMCSA's Causation Rule Would Conflict With NEPA And CEQ Regulations.

1. Under NEPA, The Scope Of The Agency's Action, Not Its Authority, Determines The Action's Effects.

Under NEPA, the effects for which an agency is responsible are primarily determined by the nature and scope of the proposed action. *Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 318-19 and 322-28 (1975) ("*SCRAP II*"); 40 C.F.R. § 1508.18 (defining a major federal action), § 1508.25 (discussing scope of an action in EIS). NEPA mandates that "all agencies of the Federal Government shall ... include in every recommendation [on] *major Federal actions* ... a detailed statement [on] the environmental impact *of the proposed action*." 42 U.S.C. § 4332(C)(i) (emphasis added). Thus, the CEQ regulations define both direct and indirect effects as those effects "which are *caused by the action*," without regard for the authority of the agency that is taking the action. 40 C.F.R. § 1508.8 (emphasis added).

Nothing in NEPA supports FMCSA's attempt to inject authorization statutes into the causal relationship between an action and its effects. Congress need not continually think about NEPA, much less allocate NEPA responsibilities, when it passes authorizing legislation, because Congress has already provided that NEPA's duties are triggered by the agencies' discretionary actions.

Consequently, the key issue here is the scope of the major federal action. That issue turns largely on whether, under Section 350, FMCSA has discretion to issue the regulations. As explained above, Section 350 grants FMCSA that discretion. The NEPA analysis then becomes clear. The "major federal action" for NEPA purposes includes FMCSA's discretionary decision to issue regulations. *See* 40 C.F.R. § 1508.18(a) (major federal action includes new or revised regulations). The requisite causal link between the action and Mexican-domiciled truck emissions is manifest: No regulations, no emissions. *See, e.g., SCRAP II*, 422 U.S. 289, 299 (1975) (agency decision to increase railroad rates included effects of diverting "traffic to trucks, which are allegedly heavier polluters than trains"). That is simply the consequence of Congress's decision to bar Mexican-domiciled trucks until FMCSA chooses to take action.

FMCSA's remedy is to convince Congress to grant it an exemption. "Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA." *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981), *cert. denied, sub nom. Atchison, T. & S. F. R. Co. v. Marsh*, 454 U.S. 1092 (1981). The somewhat peculiar NEPA consequences of Section 350 are unlikely to pose a widespread problem in the future. They are not a reason for this Court to adopt a new causation rule that

will have broad and uncertain implications for future cases.

2. Under NEPA, Agencies Must Construe Their Authority Broadly In Favor Of NEPA's Purposes Unless Compliance Is Impossible.

By allowing an agency to rely on a statute outside NEPA to disclaim responsibility for the effects of its own actions, FMCSA's rule would conflict with Section 102 of NEPA, which directs agencies to interpret *all* public laws, regulations, and policies of the United States in support of NEPA's policies "to the fullest extent possible." 42 U.S.C. § 4332. Moreover, rather than permit an agency to claim, as FMCSA does here, that it is not responsible for air pollution because it is only authorized to consider truck safety, NEPA requires FMCSA to "interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in light of the Act's national environmental objectives," 40 C.F.R. § 1500.6; *see* 42 U.S.C. § 4335, and to develop "a systematic interdisciplinary approach" to environmental protection in its decision-making. 42 U.S.C. § 4332(A).

In fact, this Court has held that Section 102 requires agencies to comply with NEPA unless another statute makes compliance impossible. *Flint Ridge Dev. Co. v. Scenic Rivers Assn. of Oklahoma*, 426 U.S. 776 (1976). In *Flint Ridge*, an agency claimed that its duty to prepare an EIS conflicted with a statute that required it to act within 30 days (leaving insufficient time for an EIS). The Court observed, "NEPA's instruction that all federal agencies comply with the impact statement requirement and with all other requirements of § 102 'to the fullest extent

possible' is neither accidental nor hyperbolic." *Id.* at 787. Reconciling this broad mandate with the fact that NEPA does not repeal by implication any other statute, the Court held that NEPA gives way only "where a clear and unavoidable conflict in statutory authority exists. . . . " *Id.* at 788. Similarly, the CEQ regulations state: "The phrase 'to the fullest extent possible' in Section 102 means that each agency of the Federal Government shall comply with that section *unless existing law applicable to the agencies' operations expressly prohibits or makes compliance impossible.*" 40 C.F.R. § 1500.6 (emphasis added). FMCSA's proposed rule invites both agencies and the courts to ignore their obligation to give effect to NEPA, absent a direct and inescapable conflict. *Flint Ridge*, 426 U.S. at 788; *cf. Watt v. Alaska*, 451 U.S. 259, 267 (1981).[7]

FMCSA mistakenly relies on a footnote in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) as authority for its proposed rule. In that decision, the Court acknowledged that tort concepts can be useful for examining causation under NEPA. *Id.* at 774. But, it then qualified this notion by explaining that

[7] FMCSA claims that *Flint Ridge* only concerns whether NEPA applies at all, not the scope of NEPA. FMCSA Br. 38 n.16. But it ignores how its rule would work. Fundamentally, FMCSA is relying on an alleged conflict between NEPA and other statutes (e.g., the moratorium statute). Without a conflict (that is, if it simply had no duty to prepare an EIS under the terms of NEPA itself), its rule would be unnecessary. *Flint Ridge* sets the standard for determining whether a statutory conflict relieves an agency of its duty to prepare an EIS. *Flint Ridge*, 426 U.S. at 788 ("the question we must resolve is whether assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict. . . . ")

causation under NEPA and causation under tort law are not identical. *Id.*, at 774, n.7. Courts must "look to the underlying policies and legislative intent in order to draw a manageable line" that marks the limits of causation under NEPA. *Id.* The Court simply meant that causation ultimately turns on Congress's intent, as expressed in NEPA's language and policies. *See id.* at 772 (examining NEPA's language and policies to resolve causation issue). FMCSA asks the Court to draw a line that is based, instead, on the "division of responsibility" between agencies. FMCSA Br. 34. If anything, *Metropolitan Edison* stands for a contrary proposition: NEPA's language and policies define its limits.

In any event, FMCSA offers no useful standards for courts to draw the manageable line that it urges – certainly, no standards that are evident in NEPA's text, legislative history, or objectives. FMCSA's reliance on the "'rule of reason' that is inherent in NEPA," FMCSA Br. 37, is an implicit admission that the rule cannot be found anywhere in NEPA's text. Indeed, FMCSA makes no serious attempt to reconcile its proffered rule with the "strong precatory language," "action-forcing procedures," and "sweeping policy goals" of NEPA itself. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989).

B. FMCSA's Causation Rule Would Deprive States, Local Governments, And The Public Of Information They Need To Mitigate The Harmful Effects Of Federal Actions.

The result of FMCSA's causation rule, if adopted, is that federal agencies will disclose fewer environmental effects of their actions, and they will prepare fewer

environmental impact statements. The effects that would trigger an EIS could be deemed to be somebody else's responsibility. When a federal agency fails to prepare an EIS, however, it deprives states, local governments and the public of an important means of protecting their interests and their communities, which is a key purpose of NEPA.

Although NEPA does not require the federal government to mitigate the environmental damage that its actions will cause, this Court unanimously explained in *Robertson* that an EIS "serves a larger informational role." *Robertson*, 490 U.S. at 352-53. It "provides a springboard for public comment." *Id.* at 349. It gives state and local governments "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Id.* at 350; *see* 40 C.F.R. § 1503.1 (requiring federal agencies to obtain comments from states, local governments, tribes, and affected or interested members of the public); 40 C.F.R. § 1502.9 (requiring federal agencies to address in final EIS opposing views not adequately addressed in draft EIS); 42 U.S.C. § 4331. And it requires the federal agency to discuss mitigation measures, even if the agency ultimately chooses not to adopt them. *See Robertson*, 490 U.S. at 352-53, 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c) and 1508.20.

"Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson*, 490 U.S. at 352. Without an EIS, states and interested groups do not have a legal forum to force the agency at least to consider alternative measures that would soften its effects on the environment or avoid impeding state and

local laws or projects. Without an EIS, States and interested groups do not have accurate information on the effects of the federal action to formulate their own mitigation measures. An EIS is the key to the action-forcing procedures that ensures NEPA's "broad national commitment to protecting and promoting environmental quality." *Id.* at 348.

Amici briefly highlight a few examples of what FMCSA's environmental assessment did *not* do. Its failures illustrate how an EIS would have served the crucial informational purposes that NEPA promises to state and local communities.

- *The EA fails to examine the air quality impacts on any actual community.*

The EA compared the emissions increases from the Mexican-domiciled trucks to *national* levels of emissions – a fictional national air, rather than the real, heavily polluted air that exists in actual communities. FMCSA made no distinction between areas that currently attain the federal standards and those that do not, but lumped them all together. JA 147-154. NEPA requires federal agencies to examine the significance of their action, not only on "society as a whole," but also on "the affected region" and "the locality." 40 C.F.R. § 1508.27(a). People breathe air locally, not nationally. FMCSA did not provide any state or local community a useful assessment of the effect of its action on the air that their citizens breathe.

- *The EA examines the air quality impacts for only a single year.*

Although the rules and their air quality effects may last years, FMCSA only examined emissions data for a single projected year, 2002. JA 152, 331-332. Consequently,

FMCSA provided no state or local community a useful assessment of how much, or in what manner, their air quality will deteriorate in future years.

- *The EA fails to examine state and local air quality standards or the applicable SIPs.*

NEPA requires an agency to consider "[w]hether the action threatens a violation of federal, State, or local law, or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). California, for example, has its own air quality standards, which are more stringent than the federal standards. Cal. Health and Saf. Code § 39606; Cal. Code of Regs., tit. 17, § 70100. The emissions from Mexican-domiciled trucks may make it impossible for California to meet its standards. JA 324, 330, 410-412. The EA, however, does not attempt to evaluate the effect of the rules on any state or local standards.

Interested parties like the California Attorney General commented on the EA, pointed out these and other shortcomings, provided data and testimony, and requested that FMCSA prepare an EIS. JA 283-306, 372-386. Without an EIS, NEPA's informational purpose cannot be served.

CONCLUSION

Amici States respectfully ask this Court to affirm the judgment of the Court of Appeals.

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DEPARTMENT OF TRANSPORTATION, et al.,

Petitioners,

v.

PUBLIC CITIZEN, et al.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMICI CURIAE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN LUNG ASSOCIATION, AND PHYSICIANS FOR SOCIAL RESPONSIBILITY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Amici American Public Health Association ("APHA") is the world's oldest and largest organization of public health professionals, representing over 50,000 health care professionals from over 50 health occupations. The APHA concerns itself with a broad set of issues, notably environmental health. Through publication of *The American Journal of Public Health* and *The Nation's Health*, and various advocacy efforts, the APHA strives to improve the overall quality of public health.

The American Lung Association ("ALA"), one of the nation's oldest voluntary health organizations, was founded in 1904. Since the 1960s, the ALA has supported national and local initiatives to combat smoking and reduce air pollution in order to reduce these threats to lung health. Recently, the ALA led initiatives to tighten Environmental Protection Agency ("EPA") regulations to reduce ambient levels of ozone and particulate air pollution, including tighter emissions standards for diesel trucks and buses and for diesel engines used in construction and other off-road equipment.

Physicians for Social Responsibility ("PSR") is a leading public policy organization of 30,000 members that

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than counsel for the amici made any monetary contributions to its preparation or submission. Both Petitioners and Respondents consented to this filing and letters of consent are being submitted with the brief. This brief was authored by Hope Babcock and Lisa Goldman of the Institute for Public Representation, with the assistance of law student Christopher Reames.

works towards a variety of goals, including promotion of a healthy environment. Since the early 1990s, PSR has worked to combat various environmental problems, including smog, airborne pollutants, and the specific threat posed to children by particulate matter pollution.

Amici support respondents' position because of the significant environmental health effects associated with diesel exhaust emissions.

SUMMARY OF ARGUMENT

Under the National Environmental Policy Act ("NEPA"), federal agencies must consider and disclose to the public the significant environmental effects of their actions. The regulations promulgated by the Federal Motor Carrier Safety Association ("FMCSA") will allow the operation of tens of thousands of heavily polluting Mexican diesel trucks in areas of the United States where they are currently not permitted to operate. Heavy-duty diesel engines, like those in Mexican diesel trucks, emit dangerous pollutants, notably particulate matter ("PM") and oxides of nitrogen ("NO_x"), which have significant adverse public health effects. These trucks could cause a substantial increase in diesel exhaust emissions with significant environmental impacts, including adverse public health effects, which FMCSA must consider and disclose under NEPA. The effects of these trucks are most likely to be felt in southwestern states that are already facing crushing air pollution problems. The regulations also potentially impair the ability of these states to comply with their federally required air quality plans under the Clean Air Act ("CAA"). In order to comply with NEPA and the CAA,

FMCSA must prepare an EIS and conduct a conformity analysis of the regulations.

ARGUMENT

I. Pollutants in Diesel Exhaust Emissions Have Significant and Severe Impacts on Public Health.

PM and NO_x, two of the main pollutants in diesel engine exhaust, have numerous adverse health effects, including increased risk of heart attacks and stroke, lung cancer, and premature death. While most current heavy-duty diesel vehicles emit these pollutants in their exhaust, Mexican diesel trucks emit higher average levels of PM and NO_x than U.S. trucks. *See, e.g.*, J.A. 239-243, 287, 332-339. Therefore, exposure to Mexican diesel exhaust emissions is more dangerous than exposure to similar emissions from U.S. trucks. In 2002 alone, FMCSA's regulations will permit the operation of at least 34,000 Mexican diesel trucks in the U.S. beyond the small border zone where they currently operate.[2] J.A. 67. These trucks will emit significant amounts of dangerous pollutants, including PM and NO_x, in areas, like Phoenix, Los Angeles, and Houston, that already have serious air pollution problems. J.A. 320, 341-342, 346-347, 427. The increased

[2] Mexican diesel trucks are currently restricted to operations in a small commercial zone along the U.S.-Mexico border called the border zone. J.A. 61-62, 253. The border zone varies in size, but is normally no more than 20 miles wide, though in certain areas of Texas (the Rio Grande Valley zone) and in San Diego, the zone extends to 70 miles in width. J.A. 61.

PM and NO_x levels from these emissions could increase the significant adverse health effects associated with those pollutants in the areas where Mexican diesel trucks will operate.

A. Health Impacts of PM

According to the EPA, PM is a "mixture of microscopic solids and liquid droplets suspended in the air" and consists of a number of different components including acids, chemicals, metals, soils, dust, and allergens like pollen. *Particulate Pollution and Your Health*, *available at* http://www.epa.gov/airnow/particle/pm-color.pdf (last viewed 3/10/2004); *see also* EPA, *Air Quality Criteria for Particulate Matter Vol. 1*, pp. 3-144, 145, Table 3-15, EPA/600/P-95001aF (1996), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=2832 (last viewed 3/10/2004) [hereinafter *PM Criteria*]. Diesel engines emit combustion PM in their exhaust. Depending on its size and composition, PM can damage lung tissue, aggravate existing respiratory and cardiovascular disease, decrease lung function, cause cancer, and lead to premature death. *Particulate Pollution and Your Health*; *PM Criteria* at 1-11, 2-22; J.A. 211. Particles smaller than 10 μm in diameter, which are further distinguished as either "coarse" (diameter 10 μm-2.5 μm) or "fine" (diameter < 2.5 μm), are the most dangerous to human health. *Particulate Pollution and Your Health*; *PM Criteria* at 6-7. Consisting "mainly of combustion particles from motor vehicles and the burning of coal, fuel oil, and wood," fine PM is more troubling from a public health perspective because it is deposited deep in the alveolar region of the lungs and is not cleared efficiently. Francine Laden et al., *Association of Fine Particulate Matter from Different Sources with Daily*

Mortality in Six U.S. Cities, 108 *Envtl. Health Persp.* 941, 945 (2000). Coarse PM, by contrast, consists mainly of crustal particles generated from activities like agriculture, transportation, construction, and mining and does not deeply penetrate the lungs. *See id.* Diesel exhaust particles fall almost exclusively into the fine PM designation, as over 90% of these particles are smaller than 1 μm. California Air Resources Board and Office of Environmental Health Hazard Assessment, *Report to the Air Resources Board on the Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Executive Summary*, at ES-6, *available at* http://www.oehha.ca.gov/air/toxic_contaminants/pdf1/diesel%20exhaust.pdf (April 22, 1998) (last viewed 3/10/2004); California Air Resources Board and Office of Environmental Health Hazard Assessment, *Report to the Air Resources Board on the Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Part B: Health Risk Assessment for Diesel Exhaust*, at 3-1, *available at* http://www.arb.ca.gov/toxics/dieseltac/part_b.pdf (April 22, 1998) (last viewed 3/10/2004). Both acute (short-term) and chronic (long-term) PM exposure can cause health problems.

The greatest health concern associated with acute exposure to PM pollution is premature death. Committee of the Environmental and Occupational Health Assembly of the American Thoracic Society, *Health Effects of Outdoor Air Pollution* (Pt. 1), 153 *Am. J. Respir. Crit. Care Med.* 3, 28-29 (1996) [hereinafter *Health Effects of Outdoor Air Pollution Part 1*]; *PM Criteria* at 1-11, 2-22. In particular, PM_{10} levels (particles less than 10 μm in size, including both fine and coarse particles) have been associated with death from all natural causes in males, David E. Abbey et al., *Long-Term Inhalable Particles and Other Air*

Pollutants Related to Mortality in Non-smokers, 159 *Am. J. Respir. Crit. Care Med.* 373, 375 (1999) [hereinafter Abbey et al., 1999], and appear to contribute to overall deaths from cardiovascular and pulmonary disease, *see* Jonathan M. Samet et al., *Fine Particulate Matter Air Pollution and Mortality in 20 U.S. Cities*, 343 *New Eng. J. Med.* 1742, 1744-1745 (2000) (*updated in* Francesca Dominici et al., *On the Use of Generalized Additive Models in Time-Series Studies of Air Pollution and Health*, 156 *Am. J. Epidemiology* 193 (2002)). Not surprisingly, since fine PM, particularly from mobile sources like diesel trucks, is of greater concern than coarse PM, *see* Laden et al., at 944-945, as levels of fine PM from mobile sources go up, daily mortality rates do so as well. *See id.* (finding that each increase of 10 $\mu g/m^3$ of mobile source fine PM was associated with a 3.4% increase in daily mortality).

Acute PM exposure has other serious health effects. *See Health Effects of Outdoor Air Pollution Part 1*, at 29-30 (discussing studies showing associations between PM levels and hospital admissions, respiratory symptoms, reduced lung function, and aggravation of asthma attacks); *see also PM Criteria* at 1-11, 2-22. For instance, researchers have observed associations between elevated PM_{10} levels and increased hospital admissions for cardiovascular and pulmonary disease in year-round and some seasonal analyses of admissions. William S. Linn et al., *Air Pollution and Daily Hospital Admissions in Metropolitan Los Angeles*, 108 *Envtl. Health Persp.* 427, 429-430 (2000). There are also indications of an association between exposure to elevated $PM_{2.5}$ concentrations and the risk of having a heart attack a few hours to one day following the exposure. *See* Annette Peters et al., *Increased*

Particulate Air Pollution and the Triggers of Myocardial Infarction, 103 *Circulation* 2810, 2814 (2001).

Chronic PM exposure produces significant health impacts as well. Chronic exposure to *elevated* ambient PM levels over a long period has been associated with decreased lung function in certain groups of people, including children and teenagers. David E. Abbey et al., *Long-Term Particulate and Other Air Pollutants and Lung Function in Nonsmokers*, 158 *Am. J. Respir. Crit. Care Med.* 289, 295 (1998); W. James Gauderman et al., *Association between Air Pollution and Lung Function Growth in Southern California Children: Results from a Second Cohort*, 166 *Am. J. Respir. Crit Care Med.* 76, 79-80 (2002); Edward Avol et al., *Respiratory Effects of Relocating to Areas of Differing Air Pollution Levels*, 164 *Am. J. Respir. Crit. Care Med.* 2067, 2068-2069 (2001). PM exposure increases the risk of death from cardiopulmonary disease and lung cancer. *See* Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 *New Eng. J. Med.* 1753 (1993); C. Arden Pope III et al., *Particulate Air Pollution as a Predictor of Mortality in a Prospective Study of U.S. Adults*, 151 *Am J. Respir. Crit. Care Med.* 669 (1995); *reviewed in* Health Effects Institute, *Reanalysis of the Harvard Six Cities Study and the American Cancer Society Study of Particulate Air Pollution and Mortality*, at iii-iv (July 2000), *available at* www.healtheffects.org/pubs-special.htm (last viewed 3/10/04); C. Arden Pope III et al., *Lung Cancer, Cardiopulmonary Mortality, and Long-Term Exposure to Fine Particulate Air Pollution*, 287 *JAMA* 1132, 1137 (2002) (associating each 10 $\mu g/m^3$ increase in long-term *average* ambient $PM_{2.5}$ concentration with an approximately 4%, 6%, and 8% increased risk of death from all

causes, cardiopulmonary causes, and lung cancer, respectively); *see also* Abbey et al., 1999, at 376 (associating long-term PM_{10} exposure levels with increased lung cancer death rates in males).

In particular, PM from diesel exhaust poses a potentially high risk of cancer. California has identified diesel exhaust as a carcinogen. Cal. Health & Safety Code §§ 25249.5, 25249.8 (2004); Cal. Code Regs. tit. 22, § 12000(b) (2004); J.A. 235, 383, 405. In fact, 70% of all cancer risk due to ambient toxics in California's South Coast Air Basin is likely attributable to PM from diesel exhaust. South Coast Air Quality Management District, *Multiple Air Toxics Exposure Study in the South Coast Air Basin (MATES-II)*, ES-3, *available at* http://www.aqmd.gov/matesiidf/es.pdf (last viewed 3/10/2004); J.A. 383, 405. EPA has also recognized that diesel exhaust is likely to cause cancer. *Diesel Exhaust in the United States*, *available at* http://www.epa.gov/otaq/retrofit/documents/f02048.pdf (last viewed 3/10/2004).

B. Health Effects of NO_x

In addition to PM, diesel exhaust emissions also contain NO_x, a term denoting gases containing nitrogen and oxygen. NO_x is formed by combustion processes, like those used in heavy-duty diesel engines. *NO_x: how nitrogen oxides affect the way we live and breathe*, *available at* http://www.epa.gov/oar/noxfldr.pdf (last viewed 3/10/2004). NO_x has significant health effects, primarily as a precursor to ground-level ozone, a dangerous pollutant with numerous negative health impacts. *Id.*

NO_x combines with volatile organic compounds ("VOCs")[3] in the presence of heat and sunlight to form ground level ozone. *Health and Environmental Effects of Ground-Level Ozone*, *available at* http://www.epa.gov/ttn/oarpg/naaqsfin/o3health.html (last viewed 3/10/2004) [hereinafter *Effects of Ground-Level Ozone*]. Acute exposure to ground level ozone can cause chest constrictions, irritation of the mucous membranes, J.A. 211, and, at high concentrations, shortness of breath, aggravation of asthma, emphysema and other respiratory conditions. J.A. 317. Acute exposure also imposes a number of significant health effects on groups like children, who are more vulnerable to air pollution because they breathe more air per pound than adults and have developing respiratory systems. *Effects of Ground-Level Ozone*. Asthmatics are also more susceptible to ozone pollution. *See id.*; *Health Effects of Outdoor Air Pollution Part 1*, at 20 (discussing associations between hospital admissions for asthma and elevated ozone levels). Studies of asthmatics suggest an association between increased respiratory symptoms and episodes of summertime air pollution like ozone. *Health Effects of Outdoor Air Pollution Part 1*, at 24. Among asthmatics, certain groups may be even more vulnerable to ozone, including children who were born prematurely or with a low birth weight. Kathleen M. Mortimer et al., *The Effect of Ozone on Inner City Children with Asthma*, 162

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[3] VOCs are emitted by numerous sources, including motor vehicles, consumer and commercial products like paints, aerosol sprays and cleaners, and various industrial processes. *See Effects of Ground-Level Ozone*; *Sources of Indoor Air Pollution – Organic Gases (Volatile Organic Compounds – VOCs)*, *available at* http://www.epa.gov/iaq/voc.html (last viewed 3/10/2004).

Am. J. Respir. Crit. Care Med. 1838, 1842-1843 (2000). Individuals with severe asthma may also face a greater risk of dying on days with higher concentrations of ozone. J. Sunyer et al., *Effect of nitrogen dioxide and ozone on the risk of dying in patients with severe asthma*, 57 *Thorax* 687, 691 (2002) (also finding an increased risk of death for severe asthmatics on days with higher levels of nitrogen dioxide).

Chronic ozone exposure results in significant negative health effects. Prolonged exposure to ozone may lead to decreased lung function in the general population. *Health Effects of Outdoor Air Pollution Part 1*, at 26-27. *See also* Audrey Galizia & Patrick L. Kinney, *Long-Term Residence in Areas of High Ozone*, 107 *Envtl. Health Persp.* 675 (1999), *available at* http://ehp.niehs.nih.gov/members/1999/107p675-679galizia/galizia-full.html (finding that people living in communities with high levels of ozone may have an increased risk of diminished lung function and incidence of respiratory symptoms). Children who spend large amounts of time playing sports outdoors in high ozone areas may also be particularly vulnerable to ozone. *See* Rob McConnell et al., *Asthma in Exercising Children Exposed to Ozone: A Cohort Study*, 359 *The Lancet* 386, 388-389 (2002) (finding an association between children playing multiple team sports and the development of physician-diagnosed asthma). Even children with well-controlled asthma may be especially vulnerable to ozone exposures at levels below EPA standards. *See* Janneane F. Gent et al., *Association of Low-Level Ozone and Fine Particles With Respiratory Symptoms in Children With Asthma*, 290 *JAMA* 1859, 1865 (2003) (finding daily ambient ozone levels to be associated with increased risk of respiratory symptoms and increased use of rescue

medication in children with asthma severe enough to require maintenance medication).

C. Economic and Social Welfare Impacts of Diesel Exhaust

Relying solely on data concerning hospitalizations and deaths understates the true adverse impact of exposure to diesel exhaust from Mexican truck emissions because such exposure imposes costs on society beyond deaths, reduced health, and decreased quality of life. Health care costs will rise, compared with what they would be otherwise, as a result of the health impacts associated with diesel exhaust from Mexican trucks. *See* J.A. 436-437 (stating that adverse health effects attributable to increased fine PM from Mexican truck emissions "can be expected to" lead to increased health care costs). Additionally, the health problems caused by these increased emissions will likely lead to "thousands of days of lost work and tens of thousands of days of restricted activity" each year in cities like Houston, which are likely to see increased Mexican truck traffic. *See* J.A. 446.

Diesel exhaust pollutants produce other serious social and economic impacts, like lost school days. *See* Frank D. Gilliland et al., *The Effects of Ambient Air Pollution on School Absenteeism Due to Respiratory Illness*, 12 *Epidemiology* 43, 47-48 (2001) (finding an association between ozone and illness-related (particularly respiratory-based) absences from school). Such school absences are costly to students, educators, and parents. Students who miss school are likely to suffer academically and to frustrate educators' efforts to teach them. Parents of children who are too sick to go to school often face a dilemma between

missing work in order to care for their children, leaving their sick children home alone, or locating childcare, a resource that is already extremely scarce and costly. When school absences and other serious impacts of air pollution related illnesses are examined, the potential health effects of diesel exhaust exposure grow even more significant.

FMCSA has estimated that its regulations would lead to 34,000 Mexican trucks operating beyond the border zone in 2002 alone.[4] J.A. 67. This would likely expose vast numbers of Americans to increased levels of diesel exhaust pollutants and their corresponding health risks. As noted above, acute and chronic exposure to PM and NO_x, two of the pollutants in Mexican diesel truck exhaust, can lead to adverse health effects and death. Acute and chronic exposures to these pollutants can also impose high social welfare costs in the form of increased health care expenditures, lost work days, and increased school absences.

[4] The government's reference to the number of applications filed by Mexican commercial motor carriers for operating authority in 1995, Pet. Brief at 8 n.3, does not indicate how many trucks those applications would have covered, as an application for operating authority may be submitted on behalf of a number of trucks. For example, FMCSA has estimated that 10,900 Mexican commercial motor carriers would operate 72,000 trucks in the U.S. under the regulations (38,000 in the border zone, 34,000 beyond the border zone). J.A. 67. Therefore, the number of applications for operating authority, by FMCSA's own admission, is smaller than the expected number of trucks.

II. FMCSA Violated NEPA by Failing to Prepare an Environmental Impact Statement Informing the Public of the Significant Public Health Effects of its Regulations.

NEPA is designed to ensure that agencies disclose the environmental impacts of their actions to the public, show that they have considered environmental concerns, and provide "a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (stating that NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process"); *Robertson*, 490 U.S. at 349 (discussing the informational role of NEPA). As an "action-forcing" statute, NEPA requires an agency to take a "hard look" at the environmental impacts of its actions and inform the public about those impacts. *Id.* at 350.

Once an agency has fulfilled its procedural obligations to consider and disclose information on environmental impacts, however, it is not substantively bound to avoid those impacts. *See Robertson*, 490 U.S. at 349-350 (stating that NEPA does not mandate particular substantive results or constrain an agency from deciding that other values outweigh environmental concerns); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (emphasizing that NEPA's "mandate ... is essentially procedural"). Therefore, contrary to Petitioners' assertions, Pet. Brief at 15, 26, merely requiring FMCSA to disclose the significant public health effects of Mexican truck operation beyond the border zone will not dictate a particular policy outcome or restrict the President's power to conduct foreign affairs.

To achieve NEPA's procedural and informational goals, agencies must prepare an Environmental Impact Statement ("EIS") for all major federal actions *significantly* affecting the quality of the human environment. 42 U.S.C. § 4332(c) (2004) (emphasis added). If an agency is unsure whether an EIS is required, it must prepare an Environmental Assessment ("EA"), 40 C.F.R. §§ 1501.4(b), (c), 1508.9 (2004), and issue a Finding of No Significant Impact ("FONSI"), 40 C.F.R. §§ 1501.4(e), 1508.13 (2004), if the action will not significantly affect the quality of the human environment. "A party challenging the agency's decision not to prepare an EIS must show only that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997).

Under regulations promulgated by the Council on Environmental Quality ("CEQ"),[5] significance is determined by reference to both context and intensity. 40 C.F.R. § 1508.27 ("§ 1508.27") (2004). Courts use the CEQ regulations in determining whether to require preparation of an EIS. *See Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229-30 (10th Cir. 2002) (finding proposed action significant under CEQ regulations on context and intensity). An agency must prepare an EIS if its action will have effects that, because of their intensity, are significant in their relevant context, *id.*; *see also Nat'l Parks & Conservation Assoc. v. Babbitt*, 241 F.3d 722, 731 (9th Cir.

[5] Courts give the CEQ regulations substantial deference. *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (stating that the "CEQ's interpretation of NEPA is entitled to substantial deference").

2001) ("Context simply delimits the scope of the agency's action . . . [i]ntensity relates to the degree to which the agency action affects the locale and interests identified in the context part of the inquiry"), and must consider several contexts, including the affected region and any long-term effects. § 1508.27(a). Intensity is determined by reference to ten factors, including public health impacts, uncertainty of impacts, illegality, and controversy; § 1508.27(b), any one of which could be sufficient to require the preparation of an EIS. *See Nat'l Parks*, 241 F.3d at 731 (stating that either uncertainty or controversy might be sufficient to require preparation of an EIS "in appropriate circumstances").

Here, the FMCSA erred in issuing a FONSI because the public health impacts that will result from the operation of Mexican diesel trucks throughout the southwest United States are so severe, in terms of both their context and intensity, that FMCSA must consider them in an EIS.[6] An EA, which is an abbreviated preliminary analysis of whether an EIS is warranted, is not adequate for regulations of this potential severity. *See* 40 C.F.R. § 1508.9 (2004) (stating that the EA is meant to be a "concise public document" that "briefly provide[s] sufficient evidence and

[6] Petitioners' contention that the regulations will have no, or minimal, environmental impact, *see* Pet. Brief at 24, is undercut by the FMCSA's acknowledgement that the application of its regulations may result in the denial of operating authority to the least safe Mexican trucks, which are most likely to be the oldest and most polluting of the Mexican truck fleet. J.A. 484. Therefore, FMCSA's regulations may have a beneficial environmental impact that could be improved by the promulgation of even stricter safety regulations. *Id.*

analysis for determining whether to prepare an [EIS] or a [FONSI]").

The EA prepared by FMCSA in this case considerably understates the environmental impacts of the regulations on public health and welfare, as discussed in greater detail below. Under the CEQ guidelines, the serious health risks associated with diesel exhaust pollutants indicate that FMCSA's regulations are likely to have a significant impact on the quality of the human environment. As noted previously in Section I, the health effects of the regulations include damage to lung tissue and lung function, aggravation of respiratory and cardiovascular disease, cancer, and even death, with attendant detrimental impacts on social and economic welfare. As will be discussed below, such health effects are likely to increase as greater numbers of Mexican trucks enter the U.S. and emit proportionally higher levels of pollutants over time. These public health effects, when properly accounted for, render the regulations intense and significant under the CEQ regulations and require preparation of an EIS. 40 C.F.R. § 1508.27(b)(2).

Moreover, as noted previously, *see* Section II.A, these health effects will fall particularly hard on the southwest region of the country. Trucks governed by the new FMCSA regulations are likely to operate in major trucking corridors in southwest urban areas, particularly cities like Phoenix, Houston, and Los Angeles, that are in nonattainment with federal air quality standards. J.A. 320, 330. Thus, the diesel exhaust emissions associated with the regulations are likely to fall on localities that already have poor air quality and are struggling to come into compliance with federal air quality standards. *Id.* Despite indications of such regional impacts, FMCSA did not consider

the impact of Mexican trucks on the southwest region of the country in its EA. Rather, it compared the increase in emissions from Mexican trucks with *all* U.S. on-road and total U.S. emissions (including all transportation sources, industrial sources, etc.). *See* J.A. 147; Pet. Brief at 12 n.5 (comparing 34,000 Mexican trucks – one-half of the approximately 72,000 trucks subject to the new regulations – operating beyond the border zone to 4.5 million trucks operating throughout the U.S.), thus masking the regional significance of the regulations in areas where those trucks are most likely to operate.[7] As a result, FMCSA must prepare an EIS in order to fully address these regional impacts, as required under the CEQ regulations. *See* § 1508.27(a); *Anderson v. Evans*, 350 F.3d 815, 835 (9th Cir. 2003) (requiring an EIS where an agency failed to adequately address the local impacts of allowing a tribe to hunt whales); *Middle Rio Grande*, 294 F.3d at 1229 (requiring an EIS, in part, because the local effects of critical habit designation were significant).

FMCSA also failed to examine the potentially significant long-term effects of its regulations, despite the fact that the CEQ regulations require an examination of both short-term and long-term effects. 40 C.F.R. § 1508.27(a). Mexican trucks are less expensive to operate and, thus, likely to displace U.S. trucks in the future, J.A. 331-332, as both the EA and Petitioners' brief acknowledge. J.A.

[7] FMCSA's choice to conduct even this national analysis, thus acknowledging that its regulations will have some effect on emissions in the U.S., undermines its argument that any increase in Mexican truck traffic would result from the lifting of the Presidential moratorium and not the regulations themselves. J.A. 59-60.

135; Pet. Brief at 12 n.5. As Mexican trucks pollute more, on average, than U.S. trucks, J.A. 315, the displacement of U.S. trucks by Mexican vehicles will lead to increased pollution in the areas where they operate. J.A. 330-332. In addition, Mexican truck traffic will likely increase due to continuously increasing freight traffic from, and trade with, Mexico, further increasing pollution levels where Mexican trucks operate. J.A. 62, 66, 123, 331. Despite evidence that both the number of Mexican trucks, and their pollution levels, will increase over time, FMCSA only evaluated the effects of Mexican trucks for the year 2002 in its EA. J.A. 67, 331, 423-424.

Additionally, the FMCSA's analysis of the environmental impacts of its regulations did not address the condition of the Mexican trucks that are likely to operate in the U.S. under the regulations. Mexican trucks manufactured prior to 1993 pollute more than their U.S. counterparts, which have been subject to stricter U.S. emissions regulations. J.A. 334, 356-358, 379, 392-393. Although FMCSA assumed that approximately one-third of Mexican trucks were manufactured after 1994, J.A. 203, and would pollute less because they were subject to stricter emissions standards, this assumption is considerably higher than more reliable estimates reported by Environ and the General Accounting Office, which place the percentage at 10% (post-1993 trucks) and 20% (post-1994 trucks), respectively. J.A. 394-395, 255. Unlike FMCSA's estimate, the other estimates were "at least founded on some analysis of raw data, and based on some ascertainable methodology." *Public Citizen, et al. v. Dept. of Transp., et al.*, 316 F.3d 1002, 1025 (9th Cir. 2003) (discussing FMCSA's analysis of the regulations' effects). FMCSA, therefore, potentially underestimated

the number of higher polluting Mexican trucks operating in the U.S. as a result of the regulations. It also underestimated the increase in emissions under the regulations because it used data on U.S. truck emissions in its analysis of Mexican trucks, J.A. 205, despite the fact that Mexican trucks manufactured before model year 1993 likely emit higher quantities of pollutants because they were subject to less strict emissions requirements. J.A. 334, 356-358, 379, 392-393.

The faulty nature of the FMCSA's environmental analysis of its regulations is further underscored by the fact that Mexican trucks are not likely to meet future U.S. emissions standards. The United States has adopted significantly stricter diesel emissions regulations for model year 2004 and 2007 diesel engines. 40 C.F.R. §§ 86.004-11, 86.007-11 (2004). In order to meet these new standards, U.S. diesel engine manufacturers will have to install devices in diesel engines that are intended solely to reduce emissions. J.A. 432. However, since these devices increase engine cost, it is unlikely that manufacturers will install them in any engines for sale in countries, like Mexico, which do not have emissions standards requiring their use.[8] J.A. 433-434. Therefore, Mexican trucks are likely to be even more polluting relative to comparable

[8] Mexico has not yet matched the new U.S. emissions standards, nor has it indicated that it plans to do so. Since model year 2004 vehicles are already being manufactured and sold in the U.S., Mexican trucks are already behind U.S. trucks in emission standards at this point. Thus, Mexican trucks are currently emitting, and will continue to emit, more pollutants than U.S. trucks.

U.S. trucks in 2004 and beyond, increasing the environmental impact of Mexican trucks entering the United States.

Furthermore, six U.S. diesel engine manufacturers are bound by consent decrees that require them to retrofit their diesel engines and to reduce emissions to meet model year 2004 emissions goals early. Accordingly, the majority of new U.S. trucks are already substantially cleaner than their Mexican counterparts. *See, e.g.,* Consent Decree, *United States v. Caterpillar, Inc.*, No. 98-02544 (HHK) (D.D.C. 1999); *Public Citizen,* 316 F.3d at 1026; J.A. 388-389, 396-397, 474. Because Mexican diesel engine manufacturers are not bound by the stricter U.S. emissions laws or the consent decrees, *id.*, the disparity in emissions between Mexican trucks and comparable U.S. trucks has already begun to widen and will do so at an accelerated rate beginning in 2004.

FMCSA's failure to include in its analysis the number of Mexican trucks that will enter the U.S. after 2002, combined with its inaccurate assessment of the condition of the Mexican truck fleet and the projected difference in Mexican and U.S. truck emissions, not only dilutes the true environmental effects of the new regulations, but also renders the extent of their future environmental effects impossible to predict accurately and, therefore, uncertain under the CEQ regulations. 40 C.F.R. § 1508.27(b)(5). Given this uncertainty, it is likely that the environmental health effects of the regulations may be substantially worse than anticipated. Because FMCSA failed to address the uncertain effects of the regulations adequately in its EA, and because the severity of the impacts that may result will likely depend on the number and condition of Mexican trucks entering the U.S., FMCSA must prepare

an EIS. 40 C.F.R. § 1508.27(b)(2), (5); *Anderson*, 350 F.3d at 835.

The regulations may also have significant effects, within the meaning of the CEQ regulations, because they will likely run afoul of state and federal environmental protection laws. 40 C.F.R. § 1508.27(b)(10). Under the CAA, California has the authority to control emissions of criteria pollutants from mobile sources by imposing standards that are more stringent than federal regulations. J.A. 452. Attempts by the California Air Resources Board ("CARB") to control heavy-duty diesel emissions will likely be frustrated, however, because CARB cannot apply its standards to Mexican trucks. J.A. 324, 452-454. Emissions from Mexican trucks may well violate California's more stringent emissions laws. *Id.* Additionally, because the regulations threaten to interfere with the ability of states to comply with the CAA, they may violate the conformity provisions of the Act, as discussed in greater detail in Section III of this brief. *See* 42 U.S.C. § 7506(c)(1) (2004) (barring federal agencies from engaging in activities that do not conform to federally mandated state implementation plans). These potential violations of state and federal environmental laws are significant and require the preparation of an EIS under 40 C.F.R. § 1508.27(b)(10).

Additionally, FMCSA must prepare an EIS because the effects of the regulations are highly controversial and, therefore, significant. 40 C.F.R. § 1508.27(b)(4). The effects are controversial because there is a substantial dispute between FMCSA and other interested parties over the "size, nature or effect" of the regulations, and because FMCSA has not adequately considered or addressed this dispute in its EA. *See Indiana Forest Alliance, Inc. v. U.S.*

Forest Service, 325 F.3d 851, 857-858 (7th Cir. 2003) (stating that if there is a dispute over the size, nature, or effect of an action, "NEPA then places the burden on the agency to come forward with a 'well-reasoned explanation' demonstrating why opinions disputing an EA's conclusions 'do not suffice to create a public controversy based on potential environmental consequences'"). Here, members of the public have disputed the size, nature, and effect of FMCSA's regulations, including the uncertain number of trucks that will enter the U.S., their impact on the southwest region of the country, the amount of pollutants that these trucks will emit, and the FMCSA's ultimate finding that the regulations would have no significant environmental impact. This dispute does not constitute simple opposition to FMCSA's decision to promulgate the regulations, but, rather, goes directly to the regulations' environmental effects. *See id.* (holding that controversy under the CEQ regulations must consist of more than opposition to a particular action). The controversy over the size, nature, and effect of the FMCSA regulations renders their effects significant and requires preparation of an EIS. 40 C.F.R. § 1508.27(b)(4).

Given their potentially significant impacts under the CEQ regulations, the FMCSA regulations are major federal actions that will significantly affect the quality of the human environment. An EA was not the proper mechanism for examining the environmental impacts of the regulations because it did not allow the FMCSA to consider fully the extent of their effects. The regulations may well lead to increased diesel exhaust emissions from Mexican trucks operating beyond the border zone where they currently operate. These diesel exhaust emissions, which have significant adverse health effects generally,

will be particularly harmful in the southwest United States, where Mexican trucks are most likely to operate. These effects will also extend well into the future, as growing numbers of higher-polluting Mexican trucks operate in the United States. The future effects of the regulations, while uncertain, are also highly controversial and will likely include, in addition to adverse public health effects, the violation of state and federal environmental laws. For these and other reasons, the regulations will significantly affect the quality of the human environment, requiring preparation of an EIS.

III. FMCSA Should Have Prepared a CAA Conformity Analysis for the Regulations Because the Resulting Emissions May Violate the CAA State Implementation Plans of States Where the Mexican Trucks Will Operate.

Finding that air pollution had resulted in "mounting dangers to the public health and welfare," Congress enacted the CAA, the purpose of which is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §§ 7401(a)(2), (b)(1) (2004). The CAA employs state implementation plans ("SIPs"), among other mechanisms, to protect public health. Under the CAA, states must submit SIPs to the Environmental Protection Agency ("EPA") providing for "implementation, maintenance, and enforcement" of EPA's national ambient air quality standards ("NAAQS"). 42 U.S.C. §§ 7407(a), 7410(a) (2004). EPA must set NAAQS for criteria pollutants, such as PM, NO_x, and ozone, at a level to protect health. 42 U.S.C. § 7409(b)(1) (2004). Thus,

SIPs serve to protect the public health by reducing emissions of harmful pollutants.

In order to ensure that the federal government does not hinder a state's ability to comply with its SIP, the CAA bars federal agencies from engaging in any activity that does not conform to an approved SIP. 42 U.S.C. § 7506(c)(1) (2004). EPA regulations require federal agencies to prepare a conformity determination for "each pollutant where the total direct and indirect emissions in a nonattainment or maintenance area" caused by the regulations would equal or exceed levels set in 40 C.F.R. § 93.153(b)(1), or where the regulations would result in an emissions increase which is more than de minimis. 40 C.F.R. § 93.153(b) (2004). This conformity determination must be made before an agency can promulgate its regulations. *See* 40 C.F.R. § 93.150(b) (2004) ("[a] Federal agency must make a determination that a Federal action conforms . . . before the action is taken").

Because emissions from Mexican trucks operating under the FMCSA regulations will exceed regulatory thresholds in certain areas of the southwest United States currently in nonattainment with EPA's NAAQS, such as Houston and Los Angeles, J.A. 320, 330, FMCSA must conduct a conformity analysis of the effect of its regulations. For example, Houston is in severe nonattainment for ozone.[9] 40 C.F.R. § 81.344 (2004); J.A. 341, 427. Some estimates indicate that in Houston, by 2007, emissions

[9] Areas which do not meet "the national primary or secondary air quality standard" for a given pollutant are designated as nonattainment areas. 42 U.S.C. § 407(d)(1)(A)(i) (2004).

increases from Mexican trucks could drastically eclipse the daily emissions conformity threshold for NO_x in a severe ozone nonattainment area.[10] J.A. 342, 427. Similarly, by 2010, increased NO_x and PM emissions in the South Coast Air Basin (including Los Angeles), which is in extreme nonattainment for ozone and serious nonattainment for PM_{10}, 40 C.F.R. § 81.305 (2004); J.A. 346-347, 427, may also exceed daily emissions conformity thresholds. J.A. 347, 427.

Because FMCSA prepared no conformity determination before issuing the regulations under review in this case, it is unclear what effect the increased emissions from Mexican trucks will have on the ability of southwest states and California to meet the requirements of their SIPs. Given the substantial increases in emissions that may result from the FMCSA's regulations, it seems likely that these states will have a difficult time complying with their SIPs. Meeting SIP requirements has proved difficult in the past, S. Rep. No. 101-228, at 10-12 (1989), and it is possible that states will simply be unable to absorb the emissions increases from Mexican trucks and still achieve the NAAQS. If this occurs, then public health will suffer because the air quality goals of the SIPs will go unmet.

In attempting to meet the NAAQS, states will likely have to cut back on other sources of pollution. J.A. 245-246. Since states cannot control the emissions of Mexican trucks or the entry of those trucks into their jurisdictions,

[10] The conformity thresholds are defined as a yearly limit, 40 C.F.R. § 93.153(b)(1) (2004), which can then be broken down into a daily threshold by dividing the yearly limit by 365. J.A. 342, 346-47, 427.

they will likely be compelled to tighten emissions controls on local industry and commerce, which may impose significant costs and job losses. In states like California, for example, some industries are already heavily regulated and could face further tightening of emissions controls as the state struggles to absorb the increased emissions from Mexican trucks operating beyond the border zone. *Id.* Because the increased emissions from Mexican trucks operating pursuant to FMCSA's regulations may hinder states' abilities to meet the requirements of their SIPs and achieve a clean and healthy atmosphere, FMCSA must prepare a conformity determination for its regulations under the CAA.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals' ruling.

Respectfully submitted,

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Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

PUBLIC CITIZEN, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; CITY OF LOS ANGELES; HONORABLE MARY BONO, CONGRESSWOMAN, 45TH DISTRICT, CALIFORNIA; AND HONORABLE ELTON GALLEGLY, CONGRESSMAN, 24TH DISTRICT, CALIFORNIA IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, under the National Environmental Policy Act, 42 U.S.C. §4332, agency action that Congress made a prerequisite to allowing Mexico-domiciled trucks to operate throughout the United States is subject to an Environmental Impact Statement that will disclose and evaluate the serious environmental effects caused by such trucking.

2. Whether, under the conformity provision of the Clean Air Act, 42 U.S.C. §7506(c)(1), that agency action requires an analysis into the extent to which permitting Mexico-domiciled trucks to operate throughout the United States will make it difficult for states to comply with federal air quality standards.

Amici disagree with Petitioner's statement of the question presented in this case FMCSA, a federal agency within the Department of Transportation ("DOT"), adopted rules governing both applications for admission of Mexico-domiciled trucks to the United States and the safety of those trucks. These rules independently determine the type and quantity of additional trucks that may enter the United States, and expand the limited border zones in which these trucks can travel. Petitioners argue that this rulemaking action has no independent impact because the President issued an order regarding the same sources regulated by the FMCSA regulations and because FMCSA has no discretion to determine environmental impacts. Petitioners attempt to misdirect the Court's attention to a review of Presidential authority. However, without the actions taken by FMCSA, no trucks would be allowed. The rules are a prerequisite for Mexico-domiciled trucks to travel outside the designated border commercial zones. Thus, Amici submit that the question of Presidential authority is not under review.

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INTEREST OF AMICI CURIAE

The South Coast Air Quality Management District ("SCAQMD"), City of Los Angeles, Honorable Mary Bono, Congresswoman, 45th District, California, and Honorable Elton Gallegly, Congressman, 24th District, California ("Amici") respectfully submit this brief in accordance with Supreme Court Rule 37.3.[1] SCAQMD is the regional air pollution control agency responsible for the South Coast Air Basin ("Basin"), which encompasses the greater Los Angeles region. The City of Los Angeles is a municipal corporation located within the Basin. Congresswoman Bono is the congressional representative of the 45th District, which is located in Riverside County and encompasses areas within the Basin and in the neighboring Coachella Valley. Congressman Gallegly is the congressional representative of the 24th District. The 24th California Congressional District includes portions of Santa Barbara and Ventura Counties, bordering the Basin to the North. Both Ventura County and Coachella Valley are impacted by emissions from the Basin. The Federal Clean Air Act ("CAA"), 42 U.S.C. §§7401 to 7671q, establishes a regulatory scheme for air pollution control that makes states primarily responsible for the control of air pollution within their jurisdictions. 42 U.S.C. §7401. However, Congress specifically reserved many mobile sources for federal regulation. Diesel trucks, subject to the Federal

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[1] The parties consented in writing to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Motor Carrier Safety Administration's ("FMCSA") regulations at issue in this case, are one such federal source. Trucks contribute significantly to air pollution within the nonattainment area under the SCAQMD's jurisdiction. The significant emissions caused by the additional truck traffic allowed by FMCSA regulations are required to be fully disclosed, analyzed and offset where possible in order to achieve clean air for the citizens of Southern California and to comply with federal law.

SUMMARY OF ARGUMENT

In March 2002, FMCSA issued three sets of Interim Final Rules permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States.[2] FMCSA was required to complete an environmental review pursuant to the National Environmental Policy Act ("NEPA"), as well as a conformity analysis pursuant to the CAA prior to the adoption of these regulations. However, instead of completing a thorough analysis, FMCSA presented a cursory environmental assessment for two of the regulations and engaged in no analysis for the third. FMCSA certified a Finding of No Significant Impact ("FONSI") based on it's conclusion that "the FMCSA is

[2] These rules are: (1) Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, 67 Fed. Reg. 12,702 (Mar. 19, 2002); (2) Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12,758 (Mar. 19, 2002); and (3) Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, 67 Fed. Reg. 12,776 (Mar. 19, 2002).

statutorily precluded from considering environmental issues in deciding whether to grant applications to provide CMC transportation in interstate or foreign commerce." U.S. Department of Transportation, Federal Motor Carrier Safety Administration, Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment, January 2002, hereinafter referred to as "EA," J.A. 36 at 52. Further, FMCSA made no attempt to complete a conformity analysis, which would have determined whether their actions would cause or contribute to any new violation of any standard, increase the frequency or severity of any existing violation, or delay timely attainment of any standard or any required interim emissions reductions in a nonattainment area. 42 U.S.C. §7506(c)(1)(B). Petitioners do not address the adequacy of FMCSA's actions in their brief. Instead, Petitioners attempt to focus the Court's attention on the President's actions in issuing an order regarding the same sources regulated by the FMCSA, stating that Respondents want FMCSA to analyze the impacts of the President's actions. Petitioners' Brief 19.

Presidential action does not relieve FMCSA of its responsibilities. FMSCA must recognize that its regulations have impacts that are independent of the President's actions and are required to complete the NEPA process and perform a conformity analysis as Congress mandates. The rules adopted by FMSCA will determine which trucks and, thus how many trucks, will be allowed to enter the United States. The emissions from these trucks will have a significant impact on the Basin and its residents. The Basin is designated an "extreme nonattainment area" for ozone, pursuant to the Federal Clean Air Act. Any emissions increase in excess of 55 pounds per day of NOx is

"significant" for the Basin, and it would only take eight additional trucks to exceed the significance threshold.

An independent researcher hired for Respondents estimates that there could be 50 tons of NOx per day representing thousands of additional trucks traveling through the Basin due to the adoption of the FMCSA rules. See (Report No. SR02-04-01) Critical Review of "Safety Oversight For Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment," prepared by John A. Volpe, Transportation Systems Center, January 2002, April 16, 2002, Sierra Research, Inc., hereinafter "Sierra Research Report," J.A. 307 at 347. The health and welfare of millions of Basin residents will clearly be adversely affected by the adoption of the rules by FMCSA. The agency, at a minimum, should be required to fully analyze and disclose the impacts of its actions, and select less polluting alternatives or mitigation, as required by NEPA and the CAA.

ARGUMENT

I. FMCSA'S RULEMAKING SIGNIFICANTLY IMPACTS THE SOUTH COAST AIR BASIN

In March 2002, FMCSA issued three sets of Interim Final Rules permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States. These rules allow Mexican-domiciled truck operators, who previously could not receive a certificate and operate in the United States, to apply for a certificate of authority to operate their trucks within the United States. These rules also establish a safety monitoring program for the Mexican trucks, whereby the certificates may be

revoked. J.A. 56-72. Trucks emit a variety of air pollutants including oxides of nitrogen ("NOx"), particulate matter ("PM10"), volatile organic compounds ("VOC") and toxic air contaminants. J.A. 314, 451. NOx and VOC react in the presence of sunlight to form ozone. J.A. 317. Ozone causes serious health effects, including inflammation of lung tissues, temporary reduction in lung capacity, aggravation of asthma, and diminishment of the immune system making the body more susceptible to respiratory illnesses. South Coast Air Quality Management District, 2003 Air Quality Management Plan[3], hereinafter "AQMP" at 2-8; Sierra Research Report, J.A. 317. Elevated ambient fine particulate matter (PM10 and PM2.5) contributes to an increase in mortality rates, respiratory infections, number and severity of asthma attacks, and the number of hospital admissions. In recent years, some studies have reported an association between long-term exposure to air pollution dominated by fine particles and increased mortality, reduction in life span, and an increased mortality from lung cancer. Recent studies also show lung function growth in children is reduced with long-term exposure to particulate matter. AQMP at 2-14; Sierra Research Report, *Id.*

The Federal Clean Air Act establishes a regulatory scheme for the prevention of air pollution in which the states have the primary responsibility of assuring the air quality for areas within their jurisdiction. CAA §101, 42 U.S.C. §7401. The states accomplish this by meeting national ambient air quality standards ("NAAQS") established by the United States Environmental Protection

[3] The AQMP is an official publication issued by the SCAQMD. This document is available at http//www.aqmd.gov/aqmp/AQMD03AQMP.htm.

Agency ("EPA"). Within each state, or over the area of several states, EPA has established air quality control regions. CAA §107, 42 U.S.C. §7407. California has several air pollution control regions, and the SCAQMD is the regional air pollution control agency for the Basin including the nondesert portions of Los Angeles, San Bernardino and Riverside Counties and Orange County. Cal. Health & Safety Code §40410.

The Clean Air Act requires the states with areas that do not meet the NAAQS, or are "in nonattainment," to submit plans like the AQMP to bring the areas into attainment by a certain date. The plans contain measures to control specific sources, thereby reducing air pollution. CAA §§109-110, 42 U.S.C. §§7409-10. NAAQS have been established for, among other pollutants, ozone and particulates.

The Basin, with a population of approximately 16 million people, is the single most heavily impacted area in the country by the criteria pollutant ozone. In fact, the Basin is designated as "extreme nonattainment" of NAAQS for ozone. J.A. 238, 319-20. Congress established categories of nonattainment for each pollutant based on the severity of the pollution levels of an area. For ozone the categories are: marginal, moderate, serious, severe and extreme. CAA §181(a), 42 U.S.C. §7511(a). The Basin is also in the classification of "serious" for nonattainment for particulate matter (PM). J.A. 320-21. The Basin is required to demonstrate attainment of the federal PM10 standard by 2006 and the federal 1-hour ozone standard by 2010. CAA §§181, 183, 42 U.S.C. §§7511, 7513. Additionally, in 1997 EPA established new NAAQS for PM2.5 and an 8-hour standard for ozone. Significant improvements in air quality will be necessary to bring the Basin

into attainment by these federal deadlines, particularly for ozone. The AQMP for the Basin sets forth a comprehensive federal, state and local program containing measures to control specific sources. The few years remaining to meet attainment deadlines afford little margin for error in implementing a comprehensive control strategy. Proper FMCSA disclosure and analysis and mitigation, where feasible, are critical to the Basin's ability to meet federally-mandated timelines.

The Basin's severe air pollution problem results from the emissions from the nation's second largest urban area, combined with meteorological conditions that are adverse to the dispersion of those emissions. The average wind speed for Los Angeles is the lowest of the nation's ten largest urban areas. Additionally, the maximum mixing height (an index of how well pollutants can be dispersed vertically in the atmosphere) in Southern California averages the lowest in the U.S. during the summer. Finally, the abundant sunshine drives the photochemical reactions that form pollutants such as ozone. AQMP 2-1.

Since the end of World War II, the Basin has experienced faster population growth than the rest of the nation. Growth has slowed somewhat, however the region's population is expected to increase significantly through 2020. AQMP at 1-4. Ozone levels have been reduced by half over the last 30 years. AQMP at 1-6. Although per-capita emissions have been brought down substantially in the Basin through 50 years of implementing pollution controls, increases in the population over that time have made overall emission reductions more difficult. Increases in the number of sources, particularly those growing proportionally to population, reduce the potential air quality benefits of new controls. The net result is that,

unless significant steps are taken to further control air pollution, growth will overwhelm much of the improvements expected from the existing control program. AQMP at 1-4. Additional sources, beyond those predicted in the AQMP, such as the uncontrolled trucks certified to enter the United States by the FMCSA rules, interfere with this region's ability to reach attainment and thus clean air for all the Basin's residents.

In accordance with CAA §110 and the California Clean Air Act, Cal. Health & Safety Code §40925, requiring triennial plan updates, and in order to fulfill the SCAQMD's commitment to update transportation emission budgets based on the latest approved motor vehicle emissions model and planning assumptions, the SCAQMD revised its AQMP in 2003. AQMP at 1-13. The AQMP contains updated emissions inventories, new modeling and modeling assumptions, and state, local and federal control measures. The AQMP was compiled with the efforts of the EPA, the California Air Resources Board ("CARB"), the SCAQMD, Southern California Association of Governments, environmental and citizens groups, industry and various other state and local governmental agencies. AQMP ES-1, ES-3. The AQMP establishes baseline emissions and seeks to reduce 233 tons per day of NOx emissions by the ozone attainment year, 2010. At the end of the planning process, even with the input of the dozens of entities involved in its development, there remains 181 tons per day of necessary NOx emissions for which specific control measure could not be identified, so-called "black box" emissions. While CARB and the SCAQMD adopted commitments to reduce the emissions and define control measures by the next AQMP revision, a tremendous amount of work remains in actually achieving these

reductions. AQMP at 4-32. These efforts are jeopardized by FMCSA's actions and its failure to conduct any substantive environmental assessment.

For some areas, such as the Basin, mobile sources contribute heavily to air pollution. However, Congress reserved authority to regulate mobile sources such as automobiles, trucks, locomotives, aircraft and marine vessels, for the federal government either exclusively or jointly with the states. See §§209 and 233 of the CAA, 42 U.S.C. §§7543, 7573. According to the SCAQMD's 2003 AQMP, mobile source emissions account for 89% of the Basin-wide NOx emissions, with on-road sources (cars, trucks and buses) accounting for 63%. By 2010, emissions from sources under SCAQMD authority such as refineries, factories, power plants and gas stations will account for only 11% of the total NOx emissions, sources under CARB authority, 56%, and those under exclusive EPA jurisdiction, 33%. AQMP 3-14 to 3-17. To ultimately achieve ambient air quality standards and demonstrate attainment, additional long-term emissions reductions will be necessary from all sources including those primarily under the jurisdiction of CARB (e.g., on-road motor vehicles, off-road equipment, and consumer products) and EPA (e.g., out of state vehicles, aircraft, ships, trains, and pre-empted nonroad equipment)[4]. AQMP 1-1. Without an adequate and fair-share level of reductions from all

[4] As explained in the Senate Report to the 1990 Amendments to the CAA, "[b]ecause States have limited resources and many additional responsibilities, both the State and Federal Government should work together to assure implementation of programs that improve air quality." 1990 U.S.C.C.A.N. at 3389.

sources, the emissions reduction burden would unfairly be shifted to stationary sources that have otherwise done their part for clean air. AQMP 4-2.

The SCAQMD has also established significance criteria pursuant to the California Environmental Quality Act (CEQA) for emissions of criteria pollutants or their precursors. NOx emissions are significant if they exceed 55 pounds per day, and PM10 emissions are significant at 150 pounds per day. The standards were derived from the major source thresholds established by Title I of the CAA. Any stationary source that contributes more than 10 tons per day of NOx is a major source. CAA §182(e); 42 U.S.C. §7511a(e). Ten tons per year is equivalent to 55 pounds per day. These standards would be used for NEPA purposes also. Taking the emissions rate used by FMCSA for a truck (J.A. 146, 399) and assuming it travels the length of the Basin, a distance of approximately 215 miles; it would take less than 8 additional trucks to exceed the NOx significance threshold.

However, based on the studies conducted by Sierra Research, the actual make-up of the Mexican fleet has an emissions rate that is significantly higher than that used by FMCSA. According to the Sierra Research report, Mexican trucks can easily contribute 50 tons per day of NOx. J.A. 347. In comparison the entire stationary and area source inventory (those sources within the jurisdiction of the SCAQMD) for the Basin is only 89 tons of NOx per day. AQMP at 3-12. This inventory is made up of thousands of sources ranging from refineries and power plants to gas stations, drycleaners and house paint. Pursuant to the CAA all major stationary sources, and in accordance with SCAQMD rules, all stationary sources are subject to stringent control requirements including permitting, best

available control technology, offset and reasonably available control technology. CAA §§165, 182(b)(2), 182(e)(1); 42 U.S.C. §§7475, 7511a(b)(2), (e)(1). Therefore, in order to offset the increased emissions from these trucks, the SCAQMD would be forced to shut down more than half of the already stringently controlled stationary sources in the Basin. Since this clearly is not possible, the emissions from the Mexican trucks must be analyzed and reduced in some other manner. While the FMCSA concludes that small increases in the number of trucks traveling through the United States is insignificant, for the Basin, a handful of additional trucks significantly impacts air quality, possibly delaying attainment of healthful standards for the area and seriously impacting the health of our residents. FMCSA must recognize and address the actual impacts in a comprehensive analysis.

II. FMCSA'S RULEMAKING HAD SIGNIFICANCE INDEPENDENT FROM THE PRESIDENTIAL ORDER LIFTING THE MORATORIUM ON MEXICAN TRUCKS

Amici submit that FMCSA's decision to issue a FONSI and not complete a conformity analysis was in error. While Petitioners concede that the FMCSA rulemakings were subject to review under NEPA, Petitioners Brief 10, Petitioners argue that "any environmental consequences of allowing cross-border operations by Mexican trucks are not 'effects' of FMCSA's truck-safety rulemakings." Petitioners Brief 24. Petitioners further state: "FMCSA recognized that the proposed rules would have 'no practical impact' until the occurrence of the 'intervening event' of the President's modification of the trade moratorium." But they also acknowledge that "the President's anticipated

lifting of that moratorium would have no effect until FMCA promulgated the required regulations." Petitioners Brief 10-11. Yet, even though they argue that the effect of one action does not occur until the other action takes place, Petitioners summarily conclude that the increase in the number of trips by Mexican trucks "would be the result of the modification of the moratorium by the President, not FMCSA's implementation of the proposed safety regulations." Petitioners Brief 11.

However, the decision to admit any given foreign carrier depends entirely on that carrier's compliance with FMCSA regulations. FMCSA is the permitting agency responsible for regulating, inspecting, and then admitting qualifying foreign trucks. In determining which carriers are admitted, FMCSA's regulations shape every aspect of the foreign truck fleet that operates in this country, including the number of trucks, the safety of those trucks, and their emissions. "The FMCSA works to ensure safety in CMC operations by developing and enforcing safety regulations, targeting high-risk carriers and CMV drivers, improving safety information systems and CMV technologies, strengthening CMV equipment and operating standards, and increasing safety awareness." J.A. 51. As the permitting agency, FMCSA is continuously responsible for the characteristics of the fleet of Mexican carriers in this country. It is this determination of the size and make-up of the Mexico-domiciled fleet that is at issue, not the independent actions of the President.

Petitioners argue that this is a case about the President's foreign policy power. In fact, lifting the moratorium was not an act of the President's constitutional foreign policy power; rather, it was an exercise of power that Congress specifically allowed the President to exercise.

Under federal law, the President was allowed unilaterally to lift the congressionally imposed moratorium, Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, Tit. I, §101, 109 Stat. 804 (49 U.S.C. §1309 *et seq.*) 49 U.S.C. §13902(c), but Congress still maintains the ability to impose conditions on cross-border trucking. In fact, Congress did. In 2001, Congress passed the Department of Transportation and Related Agencies Appropriations Act, 2002, which conditioned funding the processing of permit applications from Mexican carriers on the FMCSA's promulgation of new safety standards. Department of Trans. and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, §350, 115 Stat. 833, 864-68 (2001). This confirms the independent significance of the FMCSA rule adoptions.

Because the President's actions to implement foreign policy and foreign trade decisions is not the issue, holding that FMCSA must comply with federal environmental requirements will not impair that power in any way. Once the President exercises his authority to lift the barriers, the trucks are governed by FMCSA regulation. Those regulations have effects and those effects must be analyzed.

III. FMCSA'S ACTIONS ARE WITHIN THE CATEGORY OF FEDERAL ACTIONS CAUSING IMPACTS TO STATE AND LOCAL INTERESTS THAT CONGRESS SOUGHT TO AVOID THROUGH THE ADOPTION OF NEPA AND CAA REQUIREMENTS

The March 2002 Interim Final Rules adopted by FMCSA permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States were subject to the requirements of NEPA and the CAA. FMCSA recognized that it must comply with NEPA and, prior to the issuance of these regulations, began the

process of completing a preliminary environmental assessment ("PEA"). J.A. 36. However, FMCSA failed to completely analyze the environmental impacts caused by its rule adoption. FMCSA narrowly focused the environmental assessment. "This PEA will focus only on the potential environmental impact and safety operation implications of the proposed actions and alternatives based on: (1) the change in the number of Mexico-domiciled CMC receiving certificates of operating authority pursuant to the revised application forms (i.e., OP-2 and OP-1(MX) Forms), and the associated change in the number of Mexican CMV operating in the United States; and (2) the change in the number, method, and frequency of inspections conducted on Mexican CMV operating in the United States." J.A. 48. Because of this limited focus and a number of unsupported assumptions, such as assuming no change in the total number of inspections performed, 130,000 of 400,000 Mexican trucks manufactured after 1994, and including no calculations of trucks over U.S. weight limit of 80,000 pounds, J.A. 203-205, FMCSA found no significant impacts. Thus, FMCSA issued a Finding of No Significant Impacts for two of the regulations, and found it was entirely exempt on the third. FMCSA did not ever address the need to make a conformity finding for the Basin pursuant to the CAA. These actions do not comply with either NEPA or the CAA.

A. Congress intended that the FMCSA fully assess the local impacts of its regulations under NEPA and mitigate or find alternatives with less severe impacts

NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in

. . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" with respect to "the environmental impact of the proposed action, . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. §4332. Moreover, "to the fullest extent possible . . . policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA. 42 U.S.C. §4332. The NEPA process determines whether an action is one that "significantly" affects the environment, including an examination of direct effects and indirect effects that are "reasonably foreseeable" as well as "cumulative." 40 C.F.R. §1508.8. Significant effects include contextual effects such as ecological, aesthetic, historical, cultural, economic, social and health impacts as well as an intensity examination of direct, indirect and cumulative impacts. 40 C.F.R. §1508.27a. NEPA also requires that regional and local areas be evaluated for the proposed action's impacts upon them. *Id.* The first step in this NEPA process was the Environmental Assessment ("EA"). An EA is required to provide "sufficient evidence and analysis" to enable an agency to determine whether to prepare a full Environmental Impact Statement (EIS) or a FONSI, and to aid the agency in complying with NEPA when no EIS is prepared or facilitate preparation of an EIS when one is necessary. 40 C.F.R. §1508.9. The EA shall also include "brief discussions" describing the need of the proposed action, alternatives to the action, the environmental impacts of the proposal and its alternatives and a list of the agencies and persons consulted. *Id.*

The fact that the FMCSA rules were subject to NEPA is undisputed. FMCSA prepared an EA and a FONSI. J.A. 34-35, 36-231. It is the adequacy of the document that is in

dispute. As discussed supra at part II, FMCSA's actions in adopting the three rules had independent impacts. FMCSA failed to comply with the NEPA process when it concluded that the impact need not be analyzed. These impacts are significant in the Basin, and, therefore, FMCSA should have prepared an EIS.

The EA failed to account for emissions increases beyond those created by idling at the inspection stations. J.A. 48. The EA did not analyze toxic emissions. FMCSA erroneously concluded there would be no impacts from its rules beyond the year 2002, yet the safety inspection and certification programs do not end in 2002. As stated previously, FMCSA used unsupported assumptions to obtain a finding of no significance. J.A. 203-205.

FMCSA utilized models based on U.S. vehicles, not Mexican vehicles. J.A. 205. FMCSA, thus, ignored existing and future differences between U.S. and Mexican trucks in their emissions estimations and standards. J.A. 332-335, 391-395. A report prepared for the state of California by Environ ("Environ"), J.A. 387-413, and the Sierra Research report both concluded that the average Mexican truck is older than the average U.S. truck. This means that the average Mexican truck will have more emissions that the U.S. truck, due to the deterioration of the emissions control system and the difference in standards over time. J.A. 334-335; 360; 394-395. The fleet of Mexican trucks has also not been subject to the same emissions standards as the U.S. fleet, resulting in higher emissions from Mexican trucks compared to U.S. trucks of the same model year. J.A. 332-334 and 391-394. Additional stricter standards apply to U.S. trucks starting in 2007. J.A. 315. Sierra Research estimates that in 2010, the average Mexico-domiciled truck will emit between 2-2.4 times more

NOx, between 2.2-3 times more PM2.5, between 2.2-3 times more PM10 and between 2.1-2.3 times more VOC than the average U.S. truck due to age and emissions differences. J.A. 337.

As previously noted, the SCAQMD updated its AQMP in 2003 to incorporate new scientific data in the form of updated emissions inventories, air quality modeling tools and control measures. It is important to note that no information was provided to any of the agencies on the potential increase in emissions due to additional Mexican-domiciled trucks entering the Basin. Thus, these emissions were not included in baseline emissions, growth projections or necessary future reductions. Had FMCSA adequately assessed the impacts of its regulation as required by NEPA, this information would have been available to the SCAQMD. An important purpose of NEPA is to provide "advice and information useful in restoring, maintaining, and enhancing the quality of the environment" to states, counties, municipalities, institutions and individuals. 42 U.S.C. §4332(G). The document prepared by FMCSA fails to meet this purpose, and yet it is this informational purpose that is essential to the SCAQMD's preparation of an adequate air quality control plan. NEPA requires FMCSA to provide the information on the negative impacts the Mexican trucks will have on the Basin's air quality.

Perhaps the most important failure of the EA is its lack of a localized impacts analysis. FMCSA failed to determine whether its rules would have a significant impact based on the particular circumstances of this extreme nonattainment area. The Environ study estimates that Mexico-domiciled trucks will produce 40% more NOx and 100% more PM10 in 2010 than California trucks using

different models. J.A. 400. These estimates were derived utilizing the best scientific data currently available and underscore the importance of a full EIS by FMCSA to determine the true impacts by the emissions from the Mexican trucks on air quality in the Basin and other impacted areas.

The Mexican trucks are also not subject to the CARB and EPA consent decrees requiring U.S. trucks to be retrofitted to correct a device that is designed to circumvent emissions standards, which EPA expects will reduce emissions of U.S. trucks built between 1993 and 1998 by 36%, and to meet the national standard earlier in California. J.A. 397. Finally, the Mexican fleet will also purchase most of its diesel fuel in Mexico that is not as clean as the low sulfur diesel fuel currently required by California, adding to significant particulate emissions in the Basin. J.A. 380, 475.

Even if we were to believe FMCSA's unfounded assumptions that Mexican trucks will merely replace U.S. trucks on the roads rather than increasing the total number of trucks, significant impacts will be realized for the above-stated reasons, of lower emissions standards, dirtier diesel fuel, older trucks, and lack of retrofitting devices. Sierra Research found that replacing 50% of U.S. trucks with Mexican trucks in the Basin would result in an increase of 50 tons per day of NOx emissions and 1.2 tons per day of PM10 emissions in the year 2010 even without an increase in traffic. J.A. 347. According to Federal Highway Administration studies, the Basin lies on one of the major U.S./Mexico truck traffic corridors where the amount of freight carried by Mexican trucks may substantially increase. Thus, even a replacement of the

U.S. fleet will exacerbate the previously mentioned impacts on air quality. J.A. 322-25.

Regardless of whether the Mexican fleet replaces U.S. trucks or adds to the truck traffic in the Basin or both, significant air quality impacts will be realized in an area that already is in extreme nonattainment and is having difficulty meeting federal standards of air quality. Therefore, a complete EIS on the impacts of the Mexico-domiciled trucks to the environment by FMCSA with the requisite alternatives and mitigation is necessary in order to assure that the Basin and other affected areas meet federal standards for air quality. The EA prepared by FMCSA is inadequate and does not meet Congressional intent that federal actions assure the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. 42 U.S.C. §4331.

B. Congress required that the impacts of the FMCSA's regulations be fully analyzed pursuant to the Clean Air Act

The Clean Air Act creates a partnership between federal, state, and local governments to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §7401. Congress recognized that the states couldn't meet these standards alone. Accordingly, the CAA prohibits the federal government from approving or supporting any activity that does not conform to a plan. 42 U.S.C. §7506(c)(1). This "conformity" provision insures that the federal government does not interfere with local efforts to meet the demanding federal and state air quality requirements. The statutory

language of the CAA is sweeping: "[n]o department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan. . . ." *Id.* All federal agencies are required to affirmatively show that their actions will not cause or contribute to any new violation of any standard, increase the frequency or severity of any existing violation, or delay timely attainment of any standard or any required interim emissions reductions in a nonattainment area. 42 U.S.C. §7506(c)(1)(B).

The EPA's implementing regulations require federal agencies to issue a conformity determination "for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action" would equal or exceed specified levels. 40 C.F.R. §93.153(b). As the Basin is classified as an extreme ozone nonattainment area and a severe PM10 nonattainment area, the applicable levels for increased emissions in the Basin are 10 tons per year of NOx (the same threshold as for major sources), 40 C.F.R. §93.153(b)(1), and 70 tons per year of PM10. 40 C.F.R. §93.153(b)(2). Again, this is equal to 55 pounds per day of NOx, which is exceeded by a mere 8 additional trucks. The influx of Mexican trucks due to the FMSCA regulations, however, will lead to increased emissions in the Basin that far exceed the threshold levels. According to the Sierra Research study, the regulations would result in an increase in NOx emissions by 2010 of 50 tons *per day* in the Basin. J.A. 347. SCAQMD's current AQMP makes no provisions for these increased emissions.

FMSCA has failed to clearly demonstrate that its actions will not lead to an increase in Basin emissions above these levels. To the contrary, as the Court of Appeals

held, the EA on which FMSCA relies is "inadequate to comply with the CAA" as it lacks any consideration of the regional impact that the regulations will have on the Basin or other nonattainment areas. 316 F.3d at 1030; JA 36-231. Moreover, the Court of Appeals correctly found that FMSCA "systematically underestimated the emissions that would result from its regulations." 316 F.3d at 1030. The promulgation and implementation of the regulations will result in Mexican-domiciled trucks being allowed to travel through the Basin. J.A. 49-50, 58. Under EPA rules, the increased emissions in the Basin resulting from this influx of Mexican trucks are indirect emissions caused by the FMCSA's actions that must be taken into consideration in a proper conformity determination. EPA defines "indirect emissions" as those emissions that: "(1) are caused by the Federal action, but may occur later in time and/or may be further removed in distance for the action itself but are still reasonably foreseeable; and (2) the federal agency can practicably control and will maintain control over due to a continuing programming responsibility of the Federal agency." 40 C.F.R §93.152. While Petitioners do not dispute that the federal action is the cause of the increased truck traffic through the Basin[5], they

[5] According to the EPA rules, emissions are "caused by" Federal actions if they "would not otherwise occur in the absence of the Federal action." 40 C.F.R. §93.152. Federal action is defined as "any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves . . . Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval." *Id.*

erroneously argue that the increased emissions are not within the "continuing program responsibility of the agency." Petitioners Brief 45. According to the EPA, "[w]here an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of continuing program responsibility." 40 C.F.R §93.152. By promulgating and implementing the regulations, the FMSCA has, as part of its normal program responsibilities, imposed conditions that make it possible for Mexican-domiciled trucks to travel through the Basin. Not only will no Mexican trucks be allowed into the Basin if the FMSCA does not promulgate the rules, but also each Mexican-domiciled truck that enters the Basin will do so only because it has complied with FMCSA's application and safety regulations and has thereby been issued a certificate of authority by the agency in accordance with the regulations. Moreover, any change that FMSCA makes to the regulations has the potential to change the number and type of trucks admitted into the United States. Thus, the amount of emissions from Mexican trucks traveling through the Basin will remain under the FMCSA's practicable control and part of its continuing program responsibility.

Allowing the regulations to be implemented without requiring a conformity analysis of the impact of these Mexican trucks on SCAQMD's air quality plan will have a tremendous impact on the ability of the Basin to meet state and federal air quality standards and will have negative impacts on the health of millions of people.

CONCLUSION

The judgment of the court of appeals should be upheld.

Respectfully submitted,

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